Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 133.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG

vs.

THE VICKSBURG WATER WORKS COMPANY.

Brief for the Appellants on Motions to Dismiss or Affirm on the Merits.

STATEMENT OF FACTS.

The facts from which the issues of this suit spring may be stated as follows:

(1) About 1872 the City of Vicksburg constructed a sewer along Washington street from Veto street to Main street, a distance of seven blocks, and along Main street to the Mississippi River, where it had its outlet. This sewer was constructed solely for the purpose of carrying off surface or rain water, and was so used until the construction of a system of water works in the city in 1887. (Rec., pp. 221, 222.)

(2) On March 18, 1886, the Legislature of the State amended the charter of the City of Vicksburg by enlarging its powers:

> "To provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with a party or parties who shall build and operate water works." (See Laws of Miss., 1886, p. 694.)

(3) In pursuance of this authority the Board of Mayor and Aldermen of the City of Vicksburg, on November 18, 1886, adopted an ordinance granting to Samuel R. Bullock & Company an exclusive franchise to construct and operate for thirty years water works in the City of Vicksburg, stipulating for the rental of at least ninety hydrants for the full period of the franchise at the rate of sixty-five dollars per annum per hydrant. (See Rec., pp. 15 to 20, inc.)

Section 1 of said ordinance states the grant of the franchise and is as follows:

> "That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good, wholesome water to the City of

Vicksburg, Mississippi, and to its inhabitants, for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force."

Section 3 of said ordinance states the contract for the rental of fire hydrants, and is as follows:

"In consideration of the public benefit and the protection to property resulting from the construction of the said system of Water Works, the Mayor and Aldermen of the City of Vicksburg hereby rent from the said Samuel R. Bullock & Company, their associates, successors and assigns, not less than eighty (80) double-nozzle frost-proof fire hydrants for the aforesaid period of thirty (30) years at the annual rate of sixty-five dollars ($65) for each hydrant, to be payable semi-annually on the fifteenth day of January and July. After the first year of the operation of said water works the said city hereby rents not less than ten (10) hydrants in addition to said eighty (80) for the unexpired period of said thirty years; the first one hundred (100) hydrants shall be located on the original twelve (12) miles of mains at said annual rental of sixty-five dollars ($65) payable as aforesaid, and for the remainder of said period of thirty (30) years unexpired at the time of placing each of said hydrants. The rental of all hydrants in excess of said one hundred hydrants hereafter erected on the line of distribution mains or on the extensions thereof as hereinafter provided at the request of the said Mayor and Aldermen of the City of Vicksburg shall be at the annual rate of fifty dollars ($50) for each hydrant, payable as aforesaid, during the unexpired period of the said original term of thirty (30) years. Water shall be used from the said hydrants for the extinguishment of fires and necessary fire practice and flushing sewers. No more than two hydrants shall be opened at one time, and no more than once in each week."

(4) In February, 1887, the Vicksburg Water Supply Company was incorporated (Rec., p. 21), and on the first day of March following, Samuel R. Bullock & Company assigned to it all rights and interest conferred by or under the said ordinance. (Rec., p. 24.)

(5) The Vicksburg Water Supply Company accepted the franchise and agreed to perform the contract set forth in the said ordinance (Rec., p. 26) and thereafter constructed the plant which was accepted by the City on March 27, 1889. (Rec., p. 291–295, inc.)

(6) On March 9, 1900, the Legislature of the State of Mississippi passed a law which, among other things, provided:

> "Be it enacted by the Legislature of the State of Mississippi, That the Mayor and Aldermen of the City of Vicksburg shall have, and they are hereby authorized and empowered to issue, negotiate and sell the bonds of the said city in any sum not to exceed three hundred and seventy-five thousand ($375,000) dollars, par value. * * *
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> "One hundred and fifty thousand dollars, or so much thereof as may be necessary, for the purchase of the present power plant and system of water works, now owned and operated by the Vicksburg Water Works Company, if the said Mayor and Aldermen deem such purchase to be for the best interest of the said city, otherwise they are hereby authorized and empowered to use and apply the said amount, or so much thereof as may be necessary, for the construction, establishment and maintenance of a new and complete system of water works, to be owned, maintained and operated by the said city of Vicksburg.
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> "One hundred and fifty thousand dollars, or so much thereof as may be necessary for the construction of a system of sewerage in said city, which said system, when constructed, shall be and thereafter continue the property of the said city. The said

Mayor and Aldermen are hereby authorized and empowered to adopt such plans and specifications for the construction of said water works and sewerage system as to them may seem proper, and may enter into contract for the construction or purchase of the same and make payment therefor in accordance with the provisions of this act. But said bonds so provided for the construction of a sewerage system shall not be issued nor sold until said Mayor and Aldermen shall have first provided for the purchase or establishment of a system of water works as above provided. * * *

"Before any bonds shall be issued under the authority of this act the said Mayor and Aldermen shall give twenty (20) days' notice of an election to be held in the manner provided by law for the election of municipal officers, by publication in some newspaper printed and published in said city, naming the date thereof, and the amount of bonds to be issued, and the purpose or purposes for which they are to be issued, and if a majority of the votes cast at said election be in favor of the issuance of said bonds, then the Mayor and Aldermen of said city shall be fully authorized and empowered to issue, negotiate and sell the same, as above provided." (Laws of Mississippi, 1900, p. 180.)

(7) The Board of Mayor and Aldermen ordered an election to authorize the issue of bonds under the Act of March 9, 1900 (Rec., pp. 55, 56), and on July 3, 1900, said election was held and carried for the bond issue (Rec., p. 55).

Sometime after the holding of the bond-issue election (Complainant's Bill, Sec. 18, Rec., p. 6, says: "during the election to be held on the question of bonding the city for water works"), the following resolution was passed by the City Council and served on the Water Works Company (Rec., p. 30):

> "*Resolved*, That the water works committee is instructed to notify the present owners of the Vicksburg Water Works Company, that the city of Vicksburg is authorized by law to purchase or build a water works system not to exceed in value $150,000. including all the expenses of engineering, supervision, etc., and that said committee request the owners of said water works company to say whether or not they are willing to sell their plant, machinery and system complete to the city, and if yea, to name a price at which they will be willing to sell, and name a time within which the city shall have the option to purchase the same, giving the city authorities full time to investigate by competent engineers the condition of the system as to repairs, and affording them ample opportunity to ascertain its present value, the answer to be presented in writing at an early a day as possible for the action of this body."

(8) On August 8, 1900, the plant and other property of the Vicksburg Water Supply Company were sold under foreclosure proceedings and bought in by M. O. Crumpler, who transferred his bid to the Vicksburg Water Works Company, complainant herein (Sec. 8 of the bill, Rec. p. 3, and deed from trustee, 295), and on August 15, following, this company took charge of the plant and commenced to operate same. (Sec. 19 of bill, Rec. p. 6).

(9) On November 7, 1900, the Board of Mayor and Aldermen of the City of Vicksburg passed the resolution denying liability, as follows:

> "*Resolved*, That the Mayor be, and he is hereby instructed to notify the Vicksburg Water Works Company that the mayor and aldermen deny any liability upon any contract for the use of the water hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as shall be necessary to determine the rights of the city in the premises." (Rec., p. 30).

A copy of this resolution was served on the Water Works Company.

(10) On November 20, M. O. Crumpler gave the city official notice that the Vicksburg Water Works Company claimed to own the water works and the Bullock contract and franchise. (Rec., pp. 29, 30).

(11) The city held a general election on December 6, 1900, preceding which a conspiracy is alleged (see bill Secs. 19 and 21, Rec., pp. 6, 7), between the city, its office-holders, office-seekers, and inhabitants.

(12) The city filed suit on December 6, 1900, in the chancery court of Warren County, Mississippi, against the Water Works Company, to cancel the ordinance or contract entered into with Bullock & Company on November 18, 1886. (Rec., pp. 7, 40, 41 to 50, inc.)

(13) Sometime after January 15, 1901, the Water Works Company presented its bill for rent of water hydrants due January 15, 1901, but payment was refused (Rec., p. 10), and the matter was referred to the water committee.

(14) About this time the Water Works Company addressed a communication to the Board of Mayor and Aldermen of the city, complaining of the action of the Board in refusing to pay full hydrant rental, and called the Board's attention to the Water Company's dependence on such payment, and the saving to the city by having the water works, and it further stated the willingness of the Water Company to stand by the contract and keep up the supply, etc. (Rec., p. 31.)

(15) The Water Committee, on February 7, 1901, reported as follows:

> "Gentlemen:—Your committee would respectfully report in reference to the above subject that they have fully considered the question of the accounts

presented by said company. On the first day of October, 1900, the Board of Mayor and Aldermen passed a resolution denying any liability to said company by virtue of the contract entered into with Samuel R. Bullock & Company, but for the use of hydrants they would pay a reasonable and just compensation. Our powers, therefore, in the premises are limited to a report based upon our idea as to what is reasonable and just. We have deemed it unnecessary that we should go into any exact estimate of what is reasonable and just, and therefore have proposed to said company that we will pay them from the 15th day of August up to the day of said resolution at the rate which had been before then paid, and since that time we will pay them at the rate of $50 per hydrant, which we consider a most liberal rate; it being understood, however, that this arrangement should not be deemed conclusive as to what is reasonable and right to pay in the future and after the termination of the pending suit; neither should these payments be deemed in any way a waiver of the rights of the city in the premises." (Rec., p. 10.)

The report was on the same day adopted by the Board, the order adopting and ratifying the same being as follows:

"That the accounts be allowed on the basis and conditions of the committee's report." (Rec., p. 10.)

(16) The Mayor addressed a letter to M. O. Crumpler, superintendent of the Water Works Company, on February 14, 1901, as follows:

"Dear Sir:—I notice in the 'Evening Post' what purports to be a statement from you to the effect that the offer of the city to pay you $50 each for the use of fire hydrants was made upon such conditions as you could not accept. It is my understanding,

and I am so advised by the city attorney, that it was not the intention of the Mayor and Aldermen to impose any conditions by which your rights in the controversy with the city should be in any way affected. I am therefore prepared to take your receipt for said payments, stipulating that your rights in the premises shall not be impaired or waived by accepting payment as aforesaid." (Rec., p. 76.)

(17) Then followed the filing of complainant's bill on February 16, 1901.

(18) The Vicksburg Water Works Company, complainant herein, sold out its interest in the water works plant and company to the City Water & Light Company on July 29, 1903. (Rec., p. 102, 103.)

(19) It was probably sometime in the early part of the year 1900 that Mr. Crumpler and his associates, who afterwards organized complainant corporation, became interested in the Vicksburg water works property, but the exact date does not appear.

Mr. Crumpler, in answer to cross-interrogatories 6 and 7, refused to state the time (Rec., p. 269), and witness McFarland states that it was sometime after the passage of the act of March 9, 1900, that Mr. Crumpler came to inspect the plant, presumably before purchasing any interest in same. (Rec., p. 324.)

The Pleadings and Proceedings.

The bill of complaint avers that complainant is subrogated to all rights, franchises and contracts acquired by Samuel R. Bullock & Company from the defendant under the ordinance passed by the City Council on November 18, 1886, and accepted by Bullock & Company; that the said ordinance is a contract valid and binding in all respects, and that it has not in any way been invalidated

by any act of complainant or any of the other holders or owners of the same; that defendant accepted the same and for fourteen years abided by its terms, but that since it has desired to own and operate a plant of its own it has caused various infractions of the same, principally the passage of an act by the Legislature authorizing the city to buy or build a plant of its own, and to issue bonds to raise money for that purpose; the holding of an election by defendant to determine whether to issue said bonds or not; the offer by defendant to buy out complainant and asking a price on its plant; a conspiracy between the city and its officers and inhabitants to injure complainant; the passage of a resolution by the City Council denying liability to pay hydrant rental under the Bullock contract; conspiracy between defendant and the candidates for city offices and the newpapers of the city to create an undue prejudice against complainant and hold it up to public disfavor, and that the said several candidates for municipal office pledged themselves if elected to bring a suit to cancel complainant's contract with the city; the filing of a suit by defendant to cancel the contract; the refusal by the city to pay hydrant rentals in accordance with the terms of the Bullock contract; the use of the Washington street sewer for sewerage purposes, and the adoption by the City Council of a report by the water committee, recommending the payment to the water company the full price named in the Bullock contract for the use of the fire hydrants up to the passage of the resolution of the council denying liability under the contract, but agreeing to pay reasonable compensation after said date which the committee estimated would be about $50 per hydrant.

The acts by the city are charged to be "unjust and unlawful actions by the city because they assume to

abrogate and take away the franchise and contract rights of complainant;" that they were adopted "in pursuance of a conspiracy and a confederacy to injure the complainant and to destroy the value of its property and to coerce the complainant to sell its works at an inadequate price; that the action of the city in offering to pay $50 per hydrant, on condition that the city's rights should not be precluded thereby, was an attempt to cause complainant to waive its rights under the Bullock contract, while those of the city would be preserved.

The bill prayed for an injunction against the city restraining it from doing any act in pursuance of the Act of March 9, 1900, or of the resolution of the Board of Mayor and Aldermen of November 7, 1900, and from doing any act tending to abrogate and take away the contract rights of complainant. (Rec. p. 11.)

Upon the prayer of the bill, the following injunction was granted:

> "We therefore strictly enjoin and command you under penalty of contempt of court, that you absolutely refrain from assuming to abrogate and take away the franchise and contract rights of complainant and from endeavoring to disable complainant from carrying on its business, and to coerce said complainant to sell its water works to the defendant for the said inadequate price, and from otherwise carrying on the unlawful conspiracy set out in the said bill of complaint; and from perpetuating any minutes, or resolutions, or ordinances of its own, whereby it denies liability or seeks to annul or refuses to pay complainant contract price for water, and that defendant be compelled to pay the Vicksburg Water Works Company for water used by it as per the ordinance price as aforesaid, and to continue to do so until this cause is heard upon its merits that the rights of all parties may be preserved, and from any other proceeding against said com-

plainant touching any of the matters in said bill contained, until this honorable court shall make another order to the contrary hereof." (Rec. p. 53.)

Complainant's amended and supplemental bill (Rec. p. 55) sets forth specifically the order of the Mayor and Aldermen directing an election to be held to determine whether the sum of three hundred and fifty thousand dollars ($350,000) in bonds should be issued for the purchase or construction of a water works system, a sewerage system, and a city hall. It is also averred therein that the said election was void and no bonds could be issued in pursuance thereof; that by the contract with Samuel R. Bullock & Company the city was precluded from issuing bonds to build a water works system of its own.

On April 30, 1901, several special pleas and demurrers were filed by the defendant, which will be found in the record, pages 57-62; but on June 21st the defendant filed its answer (Rec. p. 63) which embraced all of said special demurrers and pleas, and when the court met on July 3d, an order was made granting defendant leave to withdraw said pleas and demurrers, and to file the answer marked by the clerk, filed as of June 21, 1901. (Rec. p. 83). At the time that said answer was filed there was filed also a motion to dissolve the injunction. (Rec. p. 79).

Several motions were made by the complainant to strike the pleas and demurrers from the files and to strike the answer from the files, and finally "to require the defendant to elect on which it would stand, whether on demurrers to whole bill or answers."

The court having granted the defendant leave to withdraw the special pleas and demurrers, and to file its answer, all of said motions of the complainant were overruled. (Rec. p. 83).

Defendant's answer admits the passage by the Legislature of the Act of March 9, 1900, authorizing the city to issue bonds to enable it to buy or build water works, and for other purposes, and also the holding of an election under said act to determine whether or not the city would issue the said bonds, and the giving of notice that the city was in position to buy the water works, but it denies that either said act, or the holding of said election, or the giving of said notice, or anything else alleged to have been done under the said act impaired the obligation of complainant's contract or "assumed to abrogate and take away the franchise and contract rights to complainant."

It admits the passage of the resolution of November 7, 1900, whereby the city denied liability under any contract and authorized the city attorney to bring suit to determine the city's liability in the premises, the bringing of the suit by the city to cancel the Bullock contract, and the adoption of the Water Works Committee's report whereby the city refused to pay under the Bullock contract a past due bill to the complainant, but says that the said resolution of November 7th was not passed in pursuance of the Act of the Legislature of March 9, 1900, and that it had no relation whatever to said legislative act, and that it was not passed for the purpose of the city becoming owner of the water works.

The answer submits that the said act of the Legislature and the holding of an election under the same, and the giving of notice that the city was in position to buy the plant now in operation, and the said resolution, and the bringing of suit under same, and the denial of liability and refusal to pay hydrant rentals do not, in legal contemplation, impair the obligation of complainant's

contract; wherefore, defendant prays the same benefit and advantage as if a formal demurrer had been presented to each and all of the said allegations.

It admits the passage of the Bullock ordinance, but denies that the same was valid and binding when passed, and says that so much of the same as undertook to confer an exclusive franchise upon Bullock & Company was *ultra vires* and void absolutely.

It denies that complainant is or has been the owner of the Bullock franchise, and says that by the terms of said franchise it was not assignable or transferrable after it passed into the hands of the Vicksburg Water Supply company.

It avers the insufficiency of the allegations in the bill in reference to the Washington street sewer to constitute any basis for relief, and prays the advantage of demurrer.

The answer denies that defendant has done any act tending to abrogate and take away complainant's contract rights, or to disable it in carrying on its business, or to destroy its credit or the value of its property, or to compel it to sell its property at an inadequate price, or to cast a cloud upon its title, or to work wreck and ruin on complainant, and defendant says that if the allegations above referred to and denied are to be predicated upon the resolution of November 7, 1900, they are insufficient in law to form the basis for any relief.

The answer denies any conspiracy, but says that the complainant's allegations in that regard are insufficient in law to justify any relief, and therefore prays advantage of demurrer to the same.

The answer denies that the defendant has done any wrong to or dealt harshly with complainant in any way, but says that all its actions toward complainant have been conservative and just.

On August 1, 1901, complainant filed a formal replication to defendant's answer. (Rec., p. 91).

On December 2, 1903, the City Water Works & Light Company filed a petition asking to be substituted as a party complainant in place of the Vicksburg Water Works Company. (Rec., p. 102).

This petition recited that the petitioner had bought out complainant, and was at the time the owner of the water works and the Bullock franchise and contracts, and all other property and rights involved in this suit. Appended to this petition, as an exhibit, is a certified copy of the deed of conveyance from the complainant to the petitioner. (Rec., p. 103).

No process was issued on this petition but on May 5, 1904, complainant filed its written consent that the City Water Works & Light Company might be admitted as a party complainant. (Rec., p. 111.)

On the same day defendant filed an answer to the petition of the City Water Works & Light Company denying that the City Water Works & Light Company had acquired the property of complainant, and that the said City Water Works & Light Company had any interest in the subject-matter of the suit. (Rec., p. 111.)

On the same day the City Water Works & Light Company filed its original bill in the nature of a supplemental bill, setting up that it had, by purchase and assignment from complainant, been subrogated to all the rights involved in this suit, and was then the owner of all the franchises and property involved in the same, and that the complainant had parted with all its interest.

This bill then set out in full all the pleadings before then filed in the cause and adopted the same. (Rec., p. 112.)

On May 13 following, the City Water Works & Light Company, and the Vicksburg Water Works Company filed the following motion:

> "And now comes the City Water Works & Light Company, and the said Vicksburg Water Works Company and moves the Court for leave to withdraw from the files:
>
> 1. Its petition filed December 2, 1903:
> 2. Its original bill in the nature of a supplemental bill, filed May 5, 1904, and all exhibits to said bill and petition."

Notice to opposing counsel hereto attached.

> "And the said Vicksburg Water Works Company also moves the Court for leave to withdraw the written consent to the filing of said bill from the files." (Rec., p. 169.)

After the foregoing motion had been granted by the Court (Rec., p. 170), defendant asked leave to file a supplemental answer, setting up the facts alleged in the original bill in the nature of a supplemental bill, but denying the legality of the attempted transfer and averring that by the attempted transfer and assignment the Vicksburg Water Works Company had lost and forfeited all rights acquired under the Bullock franchise, and had by its acts become "a corporate waif and derelict," and asked for a continuance to allow defendant time to take proof to establish the averments of its supplemental answer. (Rec., p. 171.)

This motion by defendant was overruled (Rec., p. 179) and the cause went to trial.

We shall not attempt to abstract the evidence, but shall refer to it from time to time throughout the argument.

The Court rendered the following final decree:

"This day this cause came on to be heard in accordance with the motion of complainant and defendant, filed January 12, 1904, and the order of this Court on the hearing of said motion rendered the said January 12, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendant, proof and exhibits, and the Court, after hearing and attending the evidence and arguments of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for on its original and amended and supplemental bills, and for full relief; it is thereupon hereby ordered, adjudged and decreed—

First. That the defendant, the Mayor and Aldermen of the City of Vicksburg, be and is hereby perpetually enjoined from abrogating or taking away, or from assuming to abrogate or take away, the franchises or contract rights of complainant under and by virtue of the ordinance, franchise or contract of said defendant, entitled 'An Ordinance to provide for a supply of water to the City of Vicksburg, in Warren county, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock & Company, their associates, successors and assigns for a supply of water for public use, and giving the said City of Vicksburg an option to purchase the said works;' ordained the 18th day of November, 1866, being the ordinance, contract, and franchise marked Exhibit 'B' to the original bill of complaint, and said ordinance, contract, and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by and is the sole and exclusive property of said complainant.

Second. That said ordinance, contract and franchise be and is hereby declared and held to be in all and every respect legal, valid, and enforcible

and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by by defendant thereunder.

Third. That said defendant be and is hereby directed to rescind its resolution and ordinance adopted the 7th day of November, 1900, which is in words and figures as follows:

'*Resolved*, That the Mayor be and is hereby instructed to notify the Vicksburg Water Works Company that the Mayor and Alderman deny any liability upon any contract for the use of the water works hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as shall be necessary to determine the rights of the city in the premises.'

And also to rescind the ordinance or resolution of said defendant adopted the 7th day of February, 1901, when the said defendant adopted the report of the committee on water works as set out in the pleadings.

Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceedings under the act of the legislature of the State of Mississippi, approved March 9, 1900, and from issuing bonds under and by virtue of said act or any other act, or ordinance, for the purpose of erecting water works of its own during the period prescribed in said ordinance, contract and franchise.

Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the period prescribed in the said ordinance, contract and franchise, dated 18th of November, 1886.

Sixth. That said defendant be and is hereby required to pay all moneys due or owing, or that may

hereafter be due or owing, to said company under and by virtue of said ordinance, contract and franchise.

Seventh. That the said defendant be and hereby is perpetually enjoined from making or adopting any resolution or ordinance refusing to pay the contract price of water fixed by said ordinance, contract and franchise until the expiration of the period prescribed in said ordinance, contract and franchise.

Eighth. That the said defendant be and is hereby enjoined from permitting any further connections for the conveyance of sewerage or excremental matter, with the storm sewer or culvert located on Washington street, City of Vicksburg, and the defendant is hereby directed and commanded, within twelve months from this date, to extend said sewer or culvert and construct an outlet therefor so as to discharge said sewerage and excremental matter into the Yazoo and Mississippi Rivers below the intake pipe of complainant; provided that if the defendant is unable to construct or extend said sewer or culvert and construct said outlet within twelve months from this date, it can apply to this Court for good cause shown for an extension of time beyond the said period of twelve months.

Ninth. That said defendant pay the costs of this cause to be taxed." (Rec., p. 365.)

From this decree defendant appealed and filed the following (Rec., p. 370):

Assignment of Errors.

Appellant assigned the following as error:

I.

That the United States Circuit Court erred in allowing the City Water Works & Light Company to withdraw its petition filed in said cause on December 2, 1903,

whereby it prayed to be admitted as a party complainant, and also in allowing the said City Water Works & Light Company to withdraw its original bill in the nature of a supplemental bill, filed in said cause on the —— day of May, 1904, and the said Court erred in allowing the complainant to withdraw its consent to the filing of said petition and the said original bill in the nature of a supplemental bill, the order authorizing the withdrawal of said several papers being in words and figures as follows, to wit:

> "This day came on to be heard the motion of the City Water Works & Light Company to withdraw from the files its petition herein filed December 2, 1903, and its original bill in the nature of a supplemental bill, filed May 5, 1904, with all exhibits, and the motion of the Vicksburg Water Works Company to withdraw from the files its written consent and the filing of said bill.
>
> "And the Court, being fully advised in the premises, doth hereby order, adjudge and decree that leave be granted as prayed for to withdraw said petition, bill, exhibits and written consent."

II.

The Court erred in refusing to allow respondent to file its supplemental answer, setting up that the said City Water Works and Light Company was an essential party complainant, and that unless it should be made a party complainant the Court could not proceed, but must dismiss the bill.

III.

The Court erred in refusing to continue the said cause on motion of respondent after it had permitted the City Water Works & Light Company to withdraw its petition and its original bill in the nature of a supplemental bill,

whereby it sought to be made a party complainant in said cause, and after it had permitted the complainant to withdraw its consent for the City Water Works & Light Company to be made a party complainant.

IV.

The said Court erred in granting the complainant's motion to strike from the evidence interrogatories Nos. 135, 136, 137, 138, 139, 140, 141, 142, 143 and 147, propounded to witness M. O. Crumpler, and the answers thereto, the said interrogatories and answers being as follows, to wit:

X-Int. 135. Mr. Crumpler, what has become of the corporation heretofore existing and known as the Vicksburg Water Works Company; have you surrendered your franchise?

Ans. We have not. It has simply sold out what property it had to the City Water Works & Light Company.

X-Int. 136. It has now no property of any kind whatever?

Ans. No, sir.

X-Int. 137. What business is it now engaged in carrying on?

Ans. Nothing.

X-Int. 138. How long since it has been engaged in carrying on business or own any property?

Ans. First of December, 1903.

X-Int. 139. What eorporate act or acts, if any, has it done since the first of December, 1903?

Ans. I don't know of any except in winding up its business.

X-Int. 140. If it has no property and is carrying on no business, what further business has it to wind up?

Ans. It is winding up the accounts, etc., that belonged to the company.

X-Int. 141. It does, then, as a matter of fact, still own some accounts and claims against people?

Ans. Yes, sir.

X-Int. 145. Then, when you said it had no property you meant that it had no tangible property—you meant that it had no water works or anything of that kind?

Ans. Yes, sir.

X-Int. 143. But it does have claims, rights, choses in action, and things of that kind unwound up?

Ans. Yes, sir.

X-Int. 147. You are the manager of the new company, the City Water Works & Light Company, the same as you were the manager of the old company, the Vicksburg Water Works Company, are you not?

Ans. Yes, sir.

V.

The said Court erred in rendering the final decree against respondent, because the said decree is contrary to the law and the facts as stated in the pleadings and proof before said Court.

VI.

The said Court erred in perpetuating by its final decree the injunction against respondent, restraining it from erecting a water works plant of its own.

VII.

The Court erred in granting a mandatory injunction against respondent commanding respondent within one year to build and construct a sewer whereby the sewer now existing on Washington street in the City of Vicksburg should be extended and made to discharge at some point on the Mississippi River south of the intake pipe of complainant.

Motions to Dismiss or Affirm.

IN THE SUPREME COURT—*October Term, 1905.*

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, *Appellant,*

vs.

THE VICKSBURG WATER WORKS COMPANY, *Appellee.*

Comes now appellee by its counsel appearing in that behalf and moves the Court to dismiss the appeal in the above entitled cause for want of jurisdiction or right of appeal direct from the United States Circuit Court, where this appeal is taken from, because the only questions involved are questions that should be decided by the United States Circuit Court of Appeals, and the case should have been appealed to that Court. Therefore this appeal should be dismissed.

2. Because said final decree appealed from was entered in strict accordance with the mandate of the Supreme Court of the United States, dated the seventh of April, 1902, in the case of the Vicksburg Water Works Company *v.* The Mayor and Aldermen of the City of Vicksburg, 185 U. S., 65.

3. The case should be dismissed because the assignment of errors are not signed by appellant or its attorney.

4. The case should be dismissed because the clerk's certificate on its face shows that certain exhibit is left out, and therefore there is not a complete transcript of the record as required by the rules.

And said appellee, by counsel as aforesaid, also moves the Court to affirm said judgment or decree from which said appeal purports to have been taken, because al-

though the record may show that this Court has jurisdiction of this appeal, yet it is manifest that said appeal is frivolous and was taken for delay only.

HUDSON & FOX,
SMITH, HIRSH & LANDAU,
Attorneys for Motion.

Argument.

On the motion set forth above, counsel for appellee have filed an elaborate brief on the merits, and, indeed, it seems that a consideration of the issues raised by the motion requires that the whole record be gone into. We therefore file with our brief on this motion our brief on the merits, the two bound together. We have done this not only because the latter had already been prepared, but for the further reason that if the former leaves out any point, reference may be had to our brief on the merits.

Brief on the Motions.

Section 5 of the Act of March 3, 1891, provides for appeals from circuit and district courts direct to the Supreme Court of the United States, "in any case that invokes the construction or application of the Constitution of the United States," and "In any case in which the constitution or law of any State is claimed to be in contravention of the Constitution of the United States."

It has been held by this Court in reference to the statute quoted above, that

> "If a claim is made in the Circuit Court, no matter by which party, that a State enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with

its object, that this Court review the judgmentat the instance of the unsuccessful party, whether plaintiff or defendant.

Loeb *v.* Trustees of Columbia Township, 179 U. S., 472.

In the case of Lampassus *v.* Bell, 180 U. S., 276, it was said, with reference to this statute, that " the claim must be real and substantial." * * * "The questions which can be raised under any of the subdivisions of Section 5 of the Act must be real, the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked."

In Carey *v.* Houston & Texas Railway Co., 150 U. S., 17, it was again said on the right of appeal under the statute just quoted, "that the construction or application of the constitution of the United States must be involved as controlling." The construction and application of the federal constitution must necessarily have been involved in the decision of the court below.

Cornell *v.* Green, 163 U. S., 75.

In case of a former appeal the questions decided on the first are not open for review on the second.

Nuestra Senora De Regla, 108 U. S., 92.

In view of the statute and of these authorities we contend that the complainant's motion to dismiss and affirm must be overruled if the record discloses any material issue, not decided on the former appeal, which involves the construction or application of the constitution of the United States or the construction of a state law, alleged by appellee and denied by appellant to be in contravention of the constitution of the United States, provided the same was by the court below decided against appellant,

We submit the following as fulfilling the above specified requirements and authorizing an appeal direct to this Court in the case at bar.

First: Did the Act of March 9, 1900 (Laws of Miss., page 180) in so far as the same authorized the defendant to issue bonds and construct water works, impair the obligation of complainant's contract and thereby contravene the constitution of the United States?

Second. Did the resolution of November 7, 1900, whereby the city denied liability to pay hydrant rentals, when construed with reference to the denials of complainant's answer and the testimony submitted on the hearing, appear to impair the obligation of complainant's contract?

Third. Does the constitution of Mississippi, in so far as the same authorizes amendments to the charter of all corporations, contravene defendant's constitutional rights, it being contended by appellant and denied by defendant, that section 178 of the constitution of Mississippi authorized the amendment of complainant's charter so as to deprive it of a monopoly and permit the city to construct water works, and that the effect of the said Act of March 9, 1900, was to amend the charter in the manner stated?

We submit that none of these questions were passed on in the first appeal, but let us examine the opinion rendered on that appeal and see just what was decided.

It was decided that a federal question appeared on the face of complainant's bill, and, we think, nothing more.

Mr. Justice Shiras, in delivering the opinion, said:

> "The sole question for our consideration is whether the bill, as originally filed and as amended, presented a federal question. * * * But our function, in the case before us on this certificate, is

> restricted to the inquiry whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a federal question is disclosed so as to give the Circuit Court jurisdiction in a suit between citizens of the same State." 185 U. S., 65, * * * Nothing in the answer or evidence was before the Court in this appeal.

The original bill, as ground for jurisdiction, averred that the passage of the Act of March 9, 1900, impaired the obligation of complainant's contract with the city, and that the action of the City Council in ordering and holding a bond election under said act and in passing the resolution or ordinance partly in pursuance of said act, and the refusal to pay hydrant rentals, and the filing of a suit to cancel the contract, likewise impaired the obligation of complainant's contract.

The question before the court on the first appeal, and and the only one, was, do these allegations or any one or more of them, taken as true, raise a federal question?

The opinion rendered passed the first allegation without deciding whether it raised a federal question or not. We quote the opinion as follows:

> "Whether this act of the Legislature of Mississippi is in its terms subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case."

It, therefore, clearly appears from the language quoted that whether this act contravenes complainant's constitutional rights or not was left open for the decision of the lower court. If this act is unconstitutional in any particular, it was certainly not so decided in the opinion rendered. If, therefore, the decree of the Court below necessarily involves a holding that this act impairs the

obligation of complainant's contract, and for that reason is unconstitutional, it comes within the last ground laid in the statute for appeal to this Court direct, and it is a question decided subsequent to the mandate from the first appeal and is material and controlling.

Considering the opinion delivered on the first appeal further we find that the jurisdiction is grounded on three allegations, as follows:

> "We think that the ordinance of the city of November 7, 1900, * * and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance do not present the mere case of a breach of a private contract, * * the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a federal question."

This bases jurisdiction solely on the action of the City Council, but does not refer to or undertake to construe or pass on the act of the Legislature of March 9, 1900. Moreover, it does not undertake to pass conclusively on the several acts of the City Council or to indicate in what way they or any of them, taken as true as averred, impair the obligation of complainant's contract.

Was it in the denial of liability and refusal to pay hydrant rentals under the Bullock ordinance, or was it the holding of an election to decide whether the city should issue bonds that fell under the condemnation of the Constitution?

The denial of liability and refusal to pay related solely to that part of the Bullock ordinance whereby the city agreed to rent ninety hydrants at a stipulated price, and the bond election related solely to the right of the city

to buy or build a plant of its own. Clearly the opinion does not undertake to decide whether the Bullock ordinance precludes the city from denying liability for hydrant rentals or from owning and operating a plant. It does decide that the bill raised a substantial question as to whether or not the several acts designated in the opinion as conferring jurisdiction impaired the obligation of complainant's contract, but left to the Court below to decide in what particulars they or any of them impaired complainant's contract; whether it was the hydrant provision or the right to exclude the city that was thereby invaded, and from the nature of the case it could decide no more.

However, the complainant's counsel have laid great stress on the following language in the opinion:

> "We think that * * unless the city can point to some inherent want of legal validity in the contract or to some such disregard by the water works of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States," etc.

What is here said necessarily refers solely to the three jurisdictional grounds set forth above as the same are stated in complainant's bill and limits the defence as to these three jurisdictional averments to a denial of the facts stated, or, in case the averments are true as stated and can not be denied to a showing of "inherent want of legal validity in the contract" itself or to "such disregard" of it by complainant as would work a forfeiture.

If the answer of complainant denies any material allegation referred to in the opinion as jurisdictional, the first opinion is not conclusive and the question is left open to be decided by the Court below on the pleadings

and evidence, and if there decided against appellant necessarily a question involving an application of the Constitution of the United States is raised and the appeal to this Court is warranted. Such a question is raised by the denial in the answer that the resolution of November 7th sought "to destroy or impair any contract" (Rec., p. 64) or that it was adopted in pursuance of any purpose or desire to become the owners of the water works (Rec., p. 70). Here are two denials, one applying to the Bullock ordinance as a whole and the other to that feature of it whereby the city rented from Bullock & Company ninety fire hydrants. These denials call for a judicial determination of the extent, if any, to which the resolution could impair complainant's contract. Did it impair the right to exclude the city from building a plant or the right to compel the city to pay hydrant rentals? The former opinion did not pass on these questions at all, but left them open for the decision of the lower Court. They involve a construction and application of the United States Constitution and are, therefore, ground for appeal to this Court.

So much for the questions raised by the denials of the answer. The opinion, by its terms above quoted, left open "all questions growing out of inherent want of legal validity in the contract." The former opinion did not undertake to construe the contact and to say how much of the same was valid and binding and how much was void, and, therefore, it could not decide to what extent, if any, the several averments impaired the same. The answer denied the validity of that provision of the Bullock franchise which granted to Bullock & Company the exclusive privilege of furnishing the city and its inhabitants with water and averred that the action of the city council in that regard was *ultra vires* and void. If this

provision of the contract is "wanting in legal validity" the city has a right to build and operate a plant, and complainant's contract would not be impaired by its so doing, and therefore, the holding of an election to vote an issue of bonds for that purpose could not impair the obligation of the contract.

The first opinion clearly leaves open this question to be decided by the lower court and we submit that it necessarily involves an application of the Constitution of the United States and a construction of the Act of March 9, 1900.

We have reviewed at length the several questions decided by this Court on the first appeal.

Let us now consider the final decree of the Court below in reference to the several questions left open by the opinion rendered on the first appeal and ascertain how many, and what, if any, of them involving the construction and application of the Constitution of the United States or the construction of a State law, alleged on the one side and denied on the other to be in contravention of the Constitution of the United States, have been decided against appellant.

The final decree after providing a general injunction against defendant restraining it from abrogating or taking away from complainant any of its franchises or contract rights provides further:

> "2. That said ordinance, contract and franchise be and is hereby declared and held to be in all and every respect legal, valid and enforcible and binding upon said defendant and said defendant is hereby prepetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts or from in any manner disturbing or interfering with the right, privilege and benefit acquired by defendant thereunder. (Rec., p. 366.)

"3. That said defendant be and is hereby directed to rescind its resolution and ordinance adopted on the 7th day of November, 1900. * * *

"4. That the said defendant refrain from in any manner accepting the benefit of or proceeding under the Act of the Legislature of the State of Mississippi, approved March 9, 1900, and from issuing bonds under and by virtue of said Act or by any other Act or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance, contract and franchise.

"5. That the said defendant refrain from constructing water works of its own until the expiration of the period perscribed in the said ordinance, contract and franchise dated the 18th day of November, 1886.

"6. That the said defendant be and is hereby required to pay all moneys due or owing or that may hereafter be due or owing to said complainant under and by virtue of said ordinance, contract and franchise.

"7. That the said defendant be and hereby is perpetually enjoined from making or adopting any resolution or ordinance refusing to pay the contract price of water fixed by the said ordinance, contract and franchise until the expiration of the period prescribed in said ordinance, contract and franchise."

I.

This sweeping injunction restrains the city from building water works for any purpose until the termination of the Bullock franchise, and from taking any action whatever under the law of March 9, 1900, with that end in view. This is necessarily a holding that the said Act of March 9, in so far as it authorized the city to build a water works plant, is unconstitutional as impairing the obligation of complainant's contract.

The sixth assignment of error brings the question before this Court as fully and as completely as possible.

The allegation in complainant's bill that the statute was in contravention of the Constitution of the United States (Rec., p. 8) and the denial of that by the defendant (Rec., p. 64) and the decree by the lower Court sustaining the contention of complainant, fulfill all the conditions of the statute. The question was not decided on the first appeal because the opinion, by express terms, so declares. It therefore remains to be shown that it is a material issue in the case. As to which we contend that undoubtedly the city had the right under the Bullock contract to build a water works plant as provided in the Act of March 9, 1900, for the purpose of flushing sewers, even though it should be held by this Court that the Bullock franchise and contract in its entirety was valid and binding on the city. We think it is equally true as a matter of law that the city had a right to build and operate water works to supply itself with water for such fire hydrants as it might need in addition to the ninety called for in the Bullock contract, and to supply its public buildings and institutions and its public fountains as they might be increased in numbers. There is no provision in that contract or ordinance which requires the city to take or pay for water from Bullock & Company, except the stipulation for the rental of ninety fire hydrants. In the absence of such agreement the city certainly had the right to supply itself and to build a plant for that purpose. If the city is to be denied such right under the Bullock contract, it is by implication and implication alone, which this Court has repeatedly held would not be permitted.

Stein *v.* Bienville, etc., W. W. Co., 141 U. S., 67.
Freeport W. W. Co. *v.* Freeport, 180 U. S., 587.
Hamilton Gaslight Co. *v.* Hamilton, 146 U. S., 258.

See also—

Collins *v.* Sherman, 31 Miss., 679.
Gains *v.* Coats, 51 Miss., 335.

In view of these authorities, can it be said that the city was by the Bullock contract precluded from building water works to supply itself with water for purposes other than those stated in that contract and in addition to the water there stipulated for? If not, the city had a right to build a plant for such supply.

So much for the constitutionality of the Act of March 9, considered solely with reference to the city's rights under it to construct water works independently of any "inherent want of legal validity in the contract."

Let us now consider the city's right to construct and operate a plant with reference to the "want of legal validity" in the Bullock ordinance or contract as left open by this Court in its former opinion.

Sections 3 and 4 of the final decree not only deny the city the right to build a plant independently of the stipulations in the Bullock ordinance, but necessarily hold that the exclusive feature of the Bullock franchise is valid, at least, as against the city.

We contend that the exclusive feature is absolutely void and does not preclude the city or any one else, because the statute authorizing the city to provide a water supply, being general in its terms, did not empower the City Council to grant to Bullock & Company any exclusive right and privilege. See laws of Mississippi, 1886, page 695—

> Sec .5. "That section twenty-eight (28) of said charter be, and is hereby amended, by adding thereto the following: * * * Article 30 to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with a party, or parties, who shall build and operate water works."

The Supreme Court of Mississippi has held that such general authority will not support an exclusive grant.

In Collins *v.* Sherman, 31 Miss., 679 just referred to, it was said by Judge Handy, in delivering the opinion of the Court :

> " It is, therefore, incumbent on the party claiming the grant of an exclusive privilege under an act of incorporation, to show that it is clearly conferred by the charter, and that it was intended thereby that the State should preclude herself of the power to make grants to others which might impair the benefits accruing to the first corporation. If the exclusive right be not clearly granted, he has no reason to complain that the legislature has thought fit, in order to promote the welfare and convenience of the community, to exercise the power which it has retained, and confer powers upon other corporations which may render the enjoyment of the first grant less valuable. It was subject to that condition that he thought fit to accept the grant, and it must, of course, be held in subordination to the power over the subject matter, reserved to the public and to be exercised by the legislature. It is but one of the numerous cases in which individual interest and advantage must yield to the public good ; and the hardship and loss occasioned by the power over the subject reserved by the State, are but the result of the tacit agreement which he made with the State in accepting the grant."

Other cases in point are Gains *v.* Coats, 51 Miss., 335, also referred to above, and Greenville Water Works Company *v.* Greenville, 7 So. Rep., 409.

This court has sustained the same doctrine in many decisions which we refer to at length in our brief on the merits.

In the light of these authorities can it not be said that there was that want of " legal validity " in the Bullock contract which authorized the city to construct and operate a plant and therefore to remove the Act of March 9th, and all action taken by the city under it from the

condemnation of the Constitution of the United States? If so, sections three and four of the final decree are erroneous, since they necessarily hold the Act of March 9, 1900, to be in contravention of the Constitution of the United States, and the right of the city to build and operate a water works plant is certainly of that degree of importance to warrant an appeal direct to this Court.

Upon this question of the constitutionality of the law of March 9, 1900, we are willing to rest appellant's right of appeal to this Court, for indeed it appears to us to be beyond cavil, but since there are other questions which we consider sufficient, if not equally clear, we shall present them.

The original bill, Sec. 15 (Rec. p. 5), avers that the resolution or ordinance of November 7th and the further act of the city in refusing to pay rentals were "partly in pursuance to an Act of the legislature of Mississippi enacted on the 9th day of March, 1900."

The answer (Rec. p. 71) denies that this action of the city was done in pursuance of said Act of the legislature or even partly in pursuance of the same or that it in any way referred to the said Act.

We take it that this court sustained the jurisdiction of the lower court solely by virtue of the allegation in the bill above referred to, to the effect that the city's actions were in pursuance of the Act of the legislature, otherwise the action of the city council would have been entirely without legislative sanction and could not fall under the condemnation of Sec. 10 of Art. 1 of the Constitution of the United States providing that:—

> "No state shall * * pass any * * law impairing the obligation of contracts."

The answer further denied that the city's action in passing the resolution or ordinance complained of was

done with any "purpose or desire to become the owner of said water works" (Rec. p. 71) or that either was done "to injure the property of complainant or to coerce it to sell said works at an inadequate price" (Rec. p. 72).

These denials of the answer raised a question of fact as to the legal effect of the allegations upon which this court based the jurisdiction of the court below. As a matter of fact, was the city's action in pursuance of the Act of the legislature or not, and if not, was it done with the purpose of acquiring complainant's water works or to injure its property or to coerce it to sell at an inadequate price? To pass on these questions the court below necessarily had to pass on the constitutionality of the resolution of the city council denying liability to complainant under "any contract" and also its action in refusing to pay rentals, as to whether these acts, construed with reference to the answer and the evidence, contravened the Constitution of the United States. At the time this case was presented to this court on the first appeal the question before the court was, do these acts on the part of the city, construed solely in the light of the averments of complainant's bill, contravene the Constitution or raise a serious question as to whether they do or not? But the question before the lower court on final hearing, and now before this court, is different. Do the acts of the city, construed in the light of the denials of defendant's answer and the proofs submitted on the hearing, contravene the Constitution? To answer this question requires both the construction and application of the Constitution of the United States and the construction of the said acts of the city as to whether they contravene the Constitution or not. Either gives jurisdiction to this court and warrants an appeal direct.

The answer also denies "that the amount which is due under the ordinance was due to complainant" (Rec., p. 75) and that the complainant was the owner of the Bullock contract whereby the city agreed to rent and pay for fire hydrants (Rec., p. 71). These denials required that complainant should prove its ownership of the Bullock contract for rental of hydrants.

The evidence offered by complainant disclosed that its title to the Bullock contract was claimed through M. O. Crumpler, who purchased the same at a foreclosure sale, from the Vicksburg Water Supply Co., and assigned his bid to complainant (Rec., p. 295).

We contend that this contract was not assignable and that neither the foreclosure sale nor the assignment by Crumpler of his bid to complainant was effective to pass any interest in the Bullock contract.

Sec. 5 of the Bullock ordinance (Rec., p. 17) provides as follows:

> "That said Samuel R. Bullock & Company, their associates, successors or assigns, may procure the organization of a water works corporation under the laws of any State, and may assign to it all the rights and privileges acquired hereunder. Provided, that such assignment shall not invalidate or affect the bond required by section (7) hereof, and no assignment thereof shall be valid unless such assignee shall in writing to said board of mayor and alderman accept this ordinance and become bound by its terms and obligations."

We submit that by the terms of this contract it could only be assigned to such corporation as Bullock & Co. might organize and assign to and they having organized and assigned to the Vicksburg Water Supply Company the contract ceased to be assignable further.

This view is borne out by the charter of the Vicks-

Water Supply Company, which after conferring the usual and customary powers to sell and hypothecate its property, generally provided further in reference to this contract (Rec., p. 21):

> "This corporation shall also have power to acquire by purchase or otherwise an assignment to it of any contract which the City of Vicksburg may have heretofore entered into with any other person or persons to provide a supply of water to the City of Vicksburg and its inhabitants and of succeeding to and exercising and enjoying all and singular the rights, powers, privileges, advantages, benefits, immunities, revenues and profits, arising out of, or accruing from such contract with said person or persons; and to have such other rights, powers and privileges as are necessary and proper to carry into execution the purposes of its organization and as may now or hereafter be conferred by the laws of the State of Mississippi."

It will be observed that in regard to this particular "contract" which it was authorized to acquire there was no authority given to sell, mortgage or dispose of the same. As to that it was to be a perpetual asset in the Water Supply Company's hands which it could not pledge, hypothecate or otherwise dispose of.

It has been held repeatedly that a public service corporation can not sell and dispose of its property and franchises and thus disable itself from performing the service for which it was created except by the clearest and most explicit authority conferred by charter or statute.

> In Thomas *v.* West Jersey R. R., 101, U. S., 71, it was said, "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are

such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the character of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

The same doctrine was reiterated by this Court in Oregon Ry. & Navigation Co *v.* Oregonian Ry. Co., 130 U. S., 1, as follows:

"Outside of the powers conferred and the privileges granted to these organizations by the statutes under which they exist, they are in all the States of the Union which, like Oregon, have the common law as the foundation of their jurisprudence, governed by that common law; and it is the established doctrine of this court, and, with some exceptions, of the States in which that common law prevails, as well as of Great Britain, from which it is derived, that such a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter."

In Brunswick Gas Light Co. *v.* United States Gas, etc., Co., 83 Me., 532; 35 Am. St. Rep., 385, the reason for holding that a public service corporation can not sell or bargain away its franchise and contracts, is stated:

"One reason why these corporations are not allowed to sell or lease their corporate powers and franchises, without legislative authority, is that, if they were able to do so, they might thereby disable themselves from the performance of their public duties, and thus escape from the power of the courts and of the legislature to enforce their performance.

But a still more serious objection to the traffic in corporate franchises is the ease with which such a power could be used to create monopolies. By its

exercise, a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint."

In Commonwealth *v.* Smith, Mass., 87; Amer. Dec., 672; 10 Allan, 448, it was said by the Supreme Court of Massachusetts, that—

"The franchise to be a corporation clearly can not be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using, and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company can not make a new railroad at its pleasure."

Other cases in point are—

Chicago Gas Light Co. *v.* Peoples Gas Light Co. (121 Ill., 530); 2 Am. St. Rep., 124.

Richardson *v.* Selby, 11 Allen (Mass.); 65, 87 Am. Dec., 700.

Coe *v.* Columbus, etc., Ry. Co. (10 Ohio State Dec., 372); 75 Am. Dec., 518.

Susquehana Canal Co. *v.* Bonham, 9 Watts & Sergeant, 27; 42 Am. Dec., 315.

Ragan *v.* Aiken, 9 Lee (Tenn.), 609; 42 Am. Rep., 684.

Gains *v.* Coats, 51 Miss., 335.

Bacon *et al. v.* The Miss. Ins. Co., 31 Miss., 116.

New Albany Water Works *v.* Louisville Banking Co., 122 Fed. Rep., 776.

If we are correct in our contention that this contract was not assignable, it still remains in the hands of the Vicksburg Water Supply Company, or else it died with that company. At all events the complainant, the Vicksburg Water Works Company, has no interest in it whatever, and therefore the acts of the city and of the Legislature of the State could not impair its obligation in so far as complainant is concerned, for the very simple reason that there was no obligation whatever to complainant under the said Bullock ordinance or contract.

This is exactly what defendant has contended from the start. From the very time that the Vicksburg Water Works Company took possession of the plant, on August 15, 1900, up to this hour, defendant has contested the assumed rights of complainant under the Bullock ordinance, and to that end the resolution of November 7 was passed, and the bill appearing as Exhibit "Y" (Rec., p. 40), was filed in the State Court to cancel the contract and the city resolved not to pay further under the contract.

In view of the limitations in the Bullock contract and also in the charter of the Vicksburg Water Supply Company on the right to assign, can it be said that complainant has shown that the city's action impaired the obligation of its contract? If it has not its case has failed, becuase the burden of proof rested on it to do so. On

the contrary, was not the City Council acting within legitimate bounds and merely performing its duty to the public and carrying out the trust reposed in it by the people in passing the resolution and refusing to pay? Moreover, it was not till the 19th day of November, 1900, or twelve days after the resolution of November 7, that complainant gave the defendant official notice that it even claimed to be the owner of the Bullock contract. (Rec., pp. 29, 30.) Was there not ground for the city to pass the resolution and to refuse to pay the rentals named in the contract until complainant had established its title to the contract and its right to the rentals? If so, the action of the City Council was proprietary and not legislative. The final decree necessarily construed them to be legislative and to be in contravention of complainant's constitutional rights under the Bullock contract, and being decided against complainant, they are sufficient grounds for appeal to this Court. They involve the right of complainant to collect hydrant rentals from defendant and are therefore material and important, though it does not appear that the assignment of errors predicates any specific relief upon them. But we take it that being jurisdictional in character and plain error, the Court, of its own motion, will consider them, though not specifically assigned for error.

Again, the complainant is a Mississippi corporation and subject to the provisions of the Constitution of the State of Mississippi in reference to corporations. This constitution provides as follows:

> "The Legislature shall have the power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interest to do so; provided, however, that no injustice shall be done to the stockholders."

From this it appears that its charter rights and powers are subject to amendment by the State. We take it that such amendment may be made by general act of the legislature or special act, and either directly by specific amendment or by implication, that is, by an act not having reference directly to its charter, but affecting the same in that it contains provisions inconsistent with its provisions, but not of a character to do injustice to the stockholders. We submit that the Act of March 9, 1900, was of the latter class and had the effect to limit or amend the charter so as to estop complainant as a matter of law from asserting any right under the Bullock franchise inconsistent with the provisions of the said Act of March 9.

This act could not impair any right or obligation of the Bullock franchise and contract except the right to exclude the city from competition, even if such right ever existed, and this Court has held in Hamilton Gas Light & Coke Co. *v.* Hamilton, 146 U. S., 258, that a right to amend a charter included the right to so amend the same as to take away the right of an exclusive franchise. Justice Harlan said in the case:

> "A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation."

It makes no difference whether it appear that the law was passed before complainant received its charter or after. If before, it took its charter subject to the provisions of the law; if after, the law simply amended the charter so as to deprive it of the power to take or hold an exclusive franchise.

Of course, if the act of March 9, 1900, had no other effect than to amend complainant's charter, as provided by the Constitution of the State of Mississippi, then this could not impair the obligation of the Bullock contract in the hands of complainant, for certainly complainant could not acquire title to more than the law which gave it being permitted it to own, and this Court could not, on the first appeal, undertake to decide whether complainant's charter was amendable, as provided in the act of March 9, 1900, or not, but the lower Court, by enjoining defendant perpetually from building water works, necessarily did, and held it not amendable, and this was sufficient ground for appeal direct.

II.

The second ground for dismissal is the alleged failure to sign the assignment of errors.

To this we reply that it is sufficiently signed. It appears (Rec., p. 372) to be signed by the solicitors for respondent.

While it does not appear that each solicitor for defendant signed individually, or that any one of them signed in his own proper name, we submit that inasmuch as the names of the solicitors appear elsewhere in the record, the signing is sufficient.

We contend, however, that the signature, either by defendant or by defendant's counsel, is not essential to the validity of the instrument. Rule 35 does not require

the assignment of errors to be signed and we submit that any paper which otherwise fulfills the requirements of the rule is sufficient. The paper in the case at bar appears on its face to be an assignment of errors which defendant will rely on in the appeal prayed.

We submit further that the question of the sufficiency of the assignment of errors is necessarily left to the discretion of the Court below. Whether or not the paper filed was an assignment of errors at all, or whether it must be signed before it could become effective to authorize an appeal, was and is left by rule 35 of this Court to the sound discretion of the lower Court, and he having accepted the paper filed, purporting to be an assignment of errors, and allowed the appeal in the case at bar on the same, it is too late to raise the question here that there is no assignment of errors in the record.

But, however that may be, it is not a jurisdictional question, and, as this Court has power over its own procedure, we submit that it is not yet too late to sign the same, *nunc pro tunc*, and to that end we have moved the Court for leaf to sign the same in our own proper names, provided this Court should be of the opinion that it is necessary and proper for the same to be signed by appellant or his counsel.

III.

As to the third ground for dismissal set forth in appellee's motion, we submit that it is insufficient to warrant a dismissal of this appeal.

It does not appear from the motion that it is material to the issues raised by the assignment of errors or that it is in any other way important. The motion is based solely on the ground that it is part of the record. We freely submit all that appellees in their briefs allege the

exhibit to show and even more. If need be we admit that it shows latteral sewers to empty into said Washington street sewer on every cross street.

The argument of counsel does not show that it is in any way material or important, nor is it alleged that appellant is in any way responsible for its loss or failure to be in the record.

If the absence of this paper from the record affords ground for a dismissal of the appeal, then it is made possible for any dishonest litigant to prevent an appeal by destroying or concealing part of the record. By this we do not suggest that opposing counsel are responsible for the loss of the exhibit in question, for indeed we are sure they are not. The fact is that the record is voluminous, comprising over one hundred separate papers, and it was necessary on many occasions for the papers to be moved from the clerk's office, and on the final hearing they were carried to the City of Jackson and afterwards returned to Vicksburg. It is surprising, indeed, that more of the papers were not lost.

However, be that as it may, the missing exhibit has been found and can now be supplied, and to that end appellant has suggested a diminution of record and moved the Court for a writ of *certiorari* to the clerk of the court below to complete the record.

Having now considered the several grounds laid in appellee's motion to dismiss and affirm, we submit that they are severally and collectively insufficient, and that the said motion ought to be overruled.

Argument on the Hearing of the Cause.

The questions for argument raised by appellant's assignment of errors may be divided, for convenience, into two groups.

First: Those growing out of the sale and conveyance by the complainant of all its interest in the subject-matter of this suit, after its commencement and before final decree, embracing the first, second, third and fourth errors assigned, and

Second: Those involving the merits of the cause and raised by the original bill and defendant's answer, embracing the fifth, sixth and seventh errors assigned.

Those groups will be taken up in their reverse order because it is desired to first present the merits of the cause.

The Merits.

Complainant's bill, stripped of redundancy and repetition, is reducible to nine averments of injury and wrong from which relief is prayed.

1. The passage of the Act of March 9, 1900, authorizing the city to issue and sell $150,000 of bonds and to buy the water works plant or construct a new plant, to be owned and operated by the city.

2. The election held under said Act to decide whether or not the city would issue the bonds as provided in same.

3. The notice served on complainant that an election had been held and carried authorizing the city to issue the bonds to buy the water works and asking whether the Water Works Company would sell, and if so, to name a price.

4. A conspiracy between the city and its inhabitants against the Water Works Company to destroy the value of its property, and abrogate and take away from it its contract rights, etc.

5. The passage of the resolution of November 7, 1900, denying liability on the part of the city to pay hydrant

rental and authorizing the city attorney to take action.

6. The bringing of a suit by the city to cancel the franchise and contract between the city and the Water Works Company.

7. The refusal by the city to pay hydrant rentals.

8. The report of the Water Works Committee recommending the payment of reasonable rental and the ratification and adoption of the same by the mayor and aldermen.

9. The discharge of sewage through the Washington street sewer into the Mississippi River above and adjacent to the water works' intake pipes, whereby the source of supply of water is alleged to be polluted.

The first of these, covered by the fifth and sixth assignments of error, raise the question of the right of defendant, city, to construct a water works plant of its own which the final decree herein perpetually enjoins it from doing.

The ninth, covered by the seventh assignment of error, involves the right of the lower Court to compel the defendant, by a mandatory injunction, to extend said Washington street sewer beyond the corporate limits, and in so doing to expend a large sum of money.

The defendant's answer, while it denies the correctness of the legal conclusions and deductions contained in complainant's bill and many of the averments of fact, in effect demurs to all of the allegations of the bill. Hence, in our argument we shall treat each allegation as if formally demurred to and argue, in addition, such issues of fact as may be presented. If the allegations of complainant's bill are insufficient in law to warrant the relief granted or if they are unsupported by the evidence this must be reversed on the merits.

Leaving out of consideration the averment of a conspiracy, which we consider frivolous and wholly unsup

ported by the evidence, the nine averments of the bill, as above stated, considered with reference to their nature and sequence, fall into three divisions, to wit:

I. The Act of March 9, 1900, and the proceedings thereunder, embracing averments numbered 1, 2 and 3 in the above classification.

II. Those actions of defendant not connected with said Act of the legislature, embracing averments numbered 5, 6, 7 and 8.

III. The Washington street sewer, averment number 9.

These will now be taken up in their order.

I.

The Act of March 9, 1900, and Proceedings of Defendant Thereunder.

The vital question in this case is the right of the defendant to operate water works during the life of the Bullock franchise. This it is perpetually restrained from doing by the decree of the court below in this cause. The basis for the injunction is the allegation and finding that defendant had precluded itself from building water works by its contract with Bullock & Co., and being thus precluded, the passage by the legislature of the Act of March 9, 1900, authorizing the defendant to issue and sell bonds for the purpose, either of buying the plant owned by complainant or of building a new one to be owned and operated by itself, was such an invasion of complainant's rights as to render the Act unconstitutional and warrant the injunction.

This Act is alleged to be unconstitutional, first, on the ground that it arbitrarily fixes an inadequate price on complainant's plant, and thereby depreciates it in value,

and second, on the ground that it impairs the obligation of complainant's contract with the city.

1. The first contention, if true, would constitute no ground for relief, because it would in no sense be a taking of complainant's property without compensation or without due process of law. However, it is not sustained by the evidence.

It is in evidence that at the time said Act was passed the plant was offered for sale to the city or any one else at a price under $150,000 (Rec. pp. 320–1) and further, that complainant bought the plant, rights and franchises, in fact, all of the property in question, for $100,000. (Rec. pp. 295–298). However, if it be conceded that the value of the property was in excess of $150,000, it could not help complainant's cause, for the reason that the Act did not in any way undertake to limit the city as to what it might pay for the plant, the only limitation being as to the amount of the bond issue. The city might add as much as it deemed proper to the proceeds derived from a sale of the bonds provided for, and furthermore the bonds might sell at a premium.

2. It is not charged that the Act, on its face, shows any inherent vice, the sole objection being that it authorizes the city to do that which complainant avers it had precluded itself from doing by its contract with Samuel R. Bullock & Co. If the city had not thus disabled itself, the object is of course bad and can not be sustained. The granting clause of the ordinance evidencing the Bullock franchise or contract, and by which it is averred that complainant is precluded, is as follows:

> "That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years, * * * unto Samuel R. Bullock & Company, *

> * * of erecting, maintaining and operating a system of waterworks, * * * within the corporate limits of the city."

We submit that this ordinance by its terms does not preclude the city. It is nothing more than a franchise granting to Bullock & Company the use of the streets and alleys for the purpose of carrying on the business of supplying the city and its inhabitants with water. Chief Justice Taney, speaking for this Court in the case of The Bank of Augusta *v.* Earle, 13 Peters, 519, defines a franchise as follows: "Franchises are special privileges conferred by government upon individuals, and which do not belong to citizens of the country, generally, of common right." From this it appears that franchises are held and exercised solely by the subjects of the sovereign or State. It follows that any limitation in a franchise, as to its use or enjoyment, refers necessarily to such only as are capable of receiving and owning the same, that is, the subjects of the sovereign, or individuals, and not the sovereign himself, or the State, which bestows or grants the same.

Applied to the case at bar, the limiting word "exclusive" applies to such, and such only, as could receive from the State the same or a like franchise to that granted to Bullock & Co., and not to the State itself, or its agent, this defendant, which, in granting the franchise in question represented the State and wielded its sovereignty in so far as authorized by charter. For the time being the defendant was the sovereign and hence the limiting word, being one that could refer only to the subject, had no reference to the defendant and could in no way exclude or preclude it from exercising the same rights and privileges granted to Bullock & Co. We do not deny that the State or this defendant could preclude

itself, for that has been held in many cases, but we assert that to do so appropriate language must have been employed, and that such does not appear in the contract before us. We admit even that the city could have excluded itself under the authority given, but we deny that the words employed, namely, "exclusive right and privilege," have that effect. We have found no authority exactly in point either against or in support of this argument, but we believe the reasoning sound and submit the same for consideration. The decision in the Lehigh Water Company's appeal, 102 Pa. St., 515, very nearly if not quite supports this view. The grant by the State to the Lehigh Company was "The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one, and no other company shall be incorporated for that purpose." It was held that this franchise was exclusive only as respects other companies, and that the borough itself was not prohibited from supplying water from works constructed by itself, even though that might impair the value of the franchise of the water company. Here, as in the case at bar, the grant is, by its terms, exclusive; nevertheless, the Court held that the borough itself was not precluded. The words of exclusion were held to refer not to the borough but to other competition. The borough being an arm of the State, represented sufficient of its sovereignty to remove it from the general terms of exclusion employed in the grant. Following the reasoning of this case the defendant in the case at bar was not by the use of the word "exclusive" in the Bullock franchise, disabled from building a water works plant of its own.

In the case of Walla Walla Water Co. *v.* Walla Walla, 172 U. S., 1, 43 L. Ed., 341, the city excluded itself by

express and appropriate terms, and the Court held the city thereby precluded. This could have been done in the case at bar, but since it was not, the city remained free to construct water works or not as its needs might suggest.

In the case of Hellena *v.* Hellena Water Works Co., 195 U. S., 648, which contains the latest utterance of this Court on the point, it is said:

> "Had it been intended to exclude the city from the privilege of establishing its own plant, such purpose would have been expressed by apt words, as was the case in Walla Walla Co."

We submit that no such apt words are found in the Bullock ordinance.

Grants of public franchises are always construed in favor of the public. This rule was laid down by this Court in the clearest terms in the case of Stein *v.* Bienville, etc., Water Works Co., 141 U. S., 67, as follows:

> "It is a settled rule of construction that in grants by the public nothing passes by implication'; and 'if on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.'"

And in Freeport Water Works Co. *v.* Freeport, 180 U. S., 587, this Court added:

> "That the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them."

We submit that under the rules of construction applied by this Court in the cases cited above, the city is not excluded by the Bullock franchise. We even go further and say with confidence that the terms of the Bullock franchise, if given their usual and customary meaning, do not preclude the city.

If, however, the Court should be of the opinion that the language employed ("the exclusive right and privilege") is comprehensive enough to preclude the city from competition, then we submit that the action of the Mayor and Aldermen in making such grant was *ultra vires* and void.

The board could have no power beyond that conferred by the legislature of the State, and the sole authority given by the legislature was "to provide for the erection and maintainance of a system of water works to supply said city with water, and to that end to contract with a party or parties, who shall build and operate water works." (Laws of Miss., 1886, p. 695.) It will be observed that the charter amendment quoted above empowered the city first, to provide a water supply, and second, to contract with a party or parties for the same. The two infinitive phrases enlarging the powers of the city are coordinate and indepenent, and by each a separate and distinct power is conferred on the city. Under the first it is simply empowered to "provide a system of water works." There is no limitation on the power; under it the city might have built and operated the system inself or it might have provided for a water supply in any other legal way. Under the second empowering phrase the city is authorized to contract with a party or parties to build and operate a system of water works, the power to contract being the essence of the second phrase. It may be that this was included in the power to provide water,

that the first necessarily implied the second, but that is not material. It is enough that the second does not limit the first to the power to provide a water supply solely by contract. It will be observed further, that both powers are by their terms general and not special or limited.

It was under this most general authority that the City Council undertook to grant to Bullock & Co., an exclusive franchise, and this, we submit, it was not authorized to do, and that its actions in the premises was *ultra vires* and void.

In Wright *v.* Nagle, 101 U. S., 791, this Court said:

> "The question here is, whether the legislature of Georgia conferred on the inferior Courts of its several counties the power of contracting away the right of the State to establish such ferries and bridges in a particular locality as the ever-changing wants of the public should in the progress of time require. In our opinion it did not. It gave these Courts the right to establish ferries and bridges, but to tie the hands of the public in respect to its future necessities. The right to establish one bridge and fix its rates of toll, does not imply a power to bind the State, or its instrumentalities not to establish another in case of necessity."

Again in Detroit Citizens' Street Railway *v.* Detroit Railway, 171 U. S., 48, this Court held that:

> "Easements in the public streets for a limited time have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently, those given in perpetuity and monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

In the case of Saginaw Gas Co. *v.* Saginaw, 28 Fed. Rep., 529, Justice Brown, now of this Court, reviewed many cases on this point and found them with practical unaminity to support the decisions above quoted.

The Supreme Court of Mississippi has followed this ruling in the case of Greenville Water Works *v.* City of Greenville, 7 So. Rep., 409, where it was held that a general authority to provide water did not authorize an exclusive grant. Judge Cooper, speaking for the Court, said:

> "There is no power given by the charter of the city of Greenville under which the municipal authorities were authorized to enter into a contract by which a monopoly for a long series of years should be given to complainant in supplying water to the manicipality and its inhabitants. The complainant does not pretend that there was any express power conferred by the charter, but seeks to infer its existence from the general powers over the subject-matter of the contract. It is not admissible to deduce implied authority of this charter from the mere general delegation of the usual power over the subject."

See also same effect Collins *v.* Sherman, 31 M., 679, and Gains *v.* Coats, 51 M., 335.

From these cases it is clear that the authority conferred on the legislature of the State did not authorize the city to grant an exclusive franchise. The city being without authority to grant such franchise to Bullock & Co., its attempt to do so was clearly *ultra vires* and the word "exclusive," as the same appear in said franchise is therefore surplusage and without effect and the franchise is the same exactly as if that word had been left out altogether.

Complainant asserts, however, that the charter amendment did empower the city to exclude itself as was done

by the City of Walla Walla (172 U. S., 1), and that therefore the exclusive feature is not void absolutely ; that while it may be void as to all other competition, as against the city, it is good. That contention is plausible and persuasive, and, if sustained, would end the argument on this branch of the case, but we submit that it is unsound in principle and unsupported by any authority. The only authority presented in the Court below to support it was the Walla Walla case, which we now contend does not even tend to support it. The grant in the Walla Walla case was not exclusive and no attempt was made to exclude any competitor except the city. Section 7 of the granting ordinance was as follows: "And until such a contract shall have been so avoided, the city of Walla Walla shall not erect, maintain or become interested in any water works except the one herein referred to, save as hereinafter specified." The only question before the Court was whether or not the City of Walla Walla had the right under a general authority to exclude itself from competition; and this Court held that it did.

Applied to the case at bar, the city, under the general authority contained in its charter amendment, might have excluded itself or any other competitor. If, therefore, it is to be held precluded by the Bullock franchise, which in terms excludes all competitors, simply because it had the power to exclude itself, the same argument would apply to each and every possible competitor, for it had the same right to exclude any other as to exclude itself, and thus all would be shut out and a monopoly created by the exclusion individually instead of collectively, of all competitors. Let us suppose that the Act of March 9, 1900, authorized the city to contract with John Smith to build a plant, instead of the authority actually

conferred to build one itself; that in pursuance of such authority the city had made such contract with John Smith, and that this suit had been brought to restrain the performance of the same. The identical argument made against the Act of March 9, 1900, could with equal force be made against the supposed Act, for the city had the same right to exclude John Smith in the first instance from competition with Bullock & Co. and their assigns that it had to exclude itself, and, as a matter of fact, did attempt to exclude him, the same as itself Thus the argument might be applied to every imaginable competitor that the city might, in the first instance, have excluded, and thus by complainant's process of reasoning we are carried around in a circle back to our starting point, and one by one every competitor is excluded and a monopoly created, just the same as if all had been excluded in a body. The vice, in exclusive franchises, condemned by the law is monopoly, and no process of reasoning can remove that evil from the Bullock franchise. By it the whole world, except Samuel R. Bullock & Co., are excluded, and it gives to them an absolute monopoly.

The question of whether or not grants like the one presented in the case at bar operate to exclude the city making them, is one that has on several occasions been before the courts of last resort, and it has invariably been held that they do not. The case of Smith *v.* Town of Westerly, 35 Atlantic Rep., 526, is exactly in point. The Court there said:

> "It will be seen at once that in attempting to grant to said company the exclusive right to lay water pipes in the public highways of said town, the town council exceeded the authority conferred by said statute, and hence that the town is not bound by said contract."

This is exactly the issue in the case at bar. The legislative authority given to the city in each case is approximately the same. In neither was there authority for an exclusive grant, and in both an exclusive grant was attempted.

The Supreme Court of Rhode Island held that the exclusive feature was void and had no bearing whatever upon the contract, and as a consequence that the town of Westerly was authorized to build a water works plant of its own and operate the same in competition with the Westerly Water Works Company.

We are aware that the United States Circuit Court in the case of Westerly Water Works *v.* Town of Westerly, 75 Fed. Rep., 181, reached a different conclusion as to the validity of this contract, but it was not on the point above suggested. The Federal Court held that the city had authority to supply itself with water or to contract with some one else to perform that service, and having contracted with another, its authority was exhausted, and hence it could not itself build a plant.

In the case of Long *v.* Duluth, 49 Minn., 280; 32 Am. St. Rep., 547, the Court found the contract to be in substance as follows:

> "That the agreement of the village is, in effect, that it will not, for the period of thirty years, either grant to any other party than this water company the privilege of supplying water and maintaining a system of water works, nor itself exercise the right of establishing water works or supplying water. We may assume that this is the proper construction of the ordinance; for if it is not, the plaintiff (appellant) has no reason for this intervention to prevent the municipal corporation from taking steps to establish and maintain a system of water works for itself; and if this is the proper construction of the ordinance, the plaintiff has no cause of action, for reasons which will presently be stated."

Upon the contract thus stated, the Supreme Court of Minnesota held:

> "The conclusion is thus reached that the charter powers of the village of Duluth did not permit it to grant an exclusive franchise, binding itself for the period of thirty years not to establish a system of water works on its own account, and that it did not become disabled to thus act in its own behalf."

The franchise in Long *v.* Duluth contains the exact provision passed on in the Walla Walla case, to the effect that the city would not construct a plant and compete with the water works company. Nevertheless, the Court held that the provision precluding the city from building a plant and competing was *ultra vires* and void, and did not bind the city. All other competition being excluded, a monopoly was attempted to be set up, which being against the policy of the law was void, and the exclusion of the city being part of the unlawful grant, failed with the rest of it. Such is the penalty laid by the law upon the doing of that which it forbids.

Under the foregoing authorities it is clear that, while a city under a general authority may exclude some competition, itself for instance, as was done in the Walla Walla case, it can not exclude all competition, as was attempted in the Westerly Water Works case, the Duluth case and in the case at bar, and further, that an attempt to exclude all competition under such general authority, is, as to the exclusive provision, *ultra vires* and absolutely void. We cite the following additional authorities:

City of Brenham *v.* Brenham Water Works, 67 Tex., 542;

Syracuse Water Co. *v.* City of Syracuse, 116 N. Y., 167.

Leaving out the word " exclusive " there is no limitation found in the grant and all competition is at once admitted and the franchise becomes the same as those passed on by the Court in the Skaneattelles and Joplin cases hereinafter cited, and in each of which it was held that the city was not precluded. Following the authority of those cases the Bullock franchise does not preclude the city from building and operating a water works plant of its own and consequently the Act of March 9, 1900, can not impair the obligation of complainant's contract in that regard for the simple reason that complainant's contract contained no such obligation.

It may be urged that while a general authority to make a grant will not support an exclusive grant that it nevertheless operates as an estoppel, and that, as applied to the case at bar, the city having attempted to grant to Bullock & Company an exclusive franchise, it is thereby estopped to set up its lack of authority to make such grant for the purpose of allowing itself to come in as a competitor, but the decisions of this and other Courts are equally clear that such contention is not maintainable.

In Sutro *v.* Pettit, 74 Cal., 332, 5 Am. St. Rep., 4422, a leading case on this point, we find the following:

> " Neither can the doctrine of estoppel, or of ratification, or of *bona fide* holding be successfully invoked by respondents. These doctrines can be invoked against municipal corporations, if at all, only in cases of informality, irregularity, etc., on the part of an authorized agent."

In the case of Dixon County *v.* Field, 111 U. S., 83, this Court decided:

> " All parties are equally bound to know the law, and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law,

> when judicially speaking, they are not, will not make them so nor can it work an *estoppel* upon the county to claim the protection of the law."

This decision is quoted and approved by Justice Lamar in the case of Board of Lake Co. Commissioners *v.* Graham, 130 U. S., 674.

There is one other contention along this line that may be set up by complainant, viz: that the authority given by the legislature to the defendant was in the alternative to supply itself with water or to grant that privilege to another by contract, and having adopted the latter, the city has thereby precluded itself. This was the contention successfully set up in the United States Circuit Court in the case of Westerly Water Works *v.* Town of Westerly, 75 Fed. Rep., 181, referred to above; in Columbia Savings Bank Fund, etc., *v.* Dawson, 130 Fed., 152, and in S. West Mo. Light Co. *v.* City of Joplin, 113 Fed., 817.

But whatever weight and authority this line of decisions might have had was destroyed utterly by the decisions of this Court in the cases of Skaneattelles *v.* Skaneattelles Water Works Co., 184 U. S., 354; Joplin *v.* SW. Mo. Light Co., 191 U. S., 150, and Hellena *v.* Hellena Water Works Co., 195 U. S., 648.

In the Skaneattelles case, 184 U. S., 354, the contention, as found by the Court and set forth in the statement of facts, were as follows:

> "It is said the village at the time of plaintiff's incorporation had the election to do the work itself * * * to confer upon a private company * * * the right to do it, and when with these two different methods for obtaining a supply of water the village chose that which called for a supply by a private company, it impliedly contracted that it would not itself thereafter take the other method for obtaining such supply."

Upon this state of facts, Judge Peckham, speaking for the Court, said:

> "We can not see any solid foundation for the claim that there was a final and conclusive election of methods by the village."

In the Joplin case, 191 U. S., 150, Justice McKenna, after stating the case, said:

> "It is contended that * * * the city was given the power to construct an electrical plant * * * to 'supply private lights for the use of the inhabitants of the city,' or it could grant that right 'to any person or persons or corporation.' * * *. It chose the latter. * * * And it is hence contended that thereby the city contracted not to build works of its own."

This Court held, upon the foregoing statement of facts, that the City of Joplin, by electing to contract for lights, did not thereby preclude itself from, afterwards, under the same authority, providing lights by building and operating a plant of its own.

In these cases the question of the city's exclusion is treated as one of construction simply—that is to say, did the several cities, by contracting, under the dual authority, to build or contract for the utilities in question, thereby agree that they would not during the life of their respective contracts resort to the other branch of the authority conferred and build and operate a plant of their own to supply the utility?

Justice McKenna, in rendering the opinion in the Joplin case, said:

> "It is by implication from the statute and the ordinance passed under it, not from the explicit expression of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant

to the appellee is not exclusive—that is, it is conceded the city has not exhausted its power under the statute by the grant held by appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but can not itself become such competitor. The strength of the argument urged to support the distinction is in the consideration that competition by the city would be more effective than competition by private persons or corporations—indeed, might be destructive. The city, it is further urged, could be indifferent to profits, and could tax its competitor to compensate losses. But this is speculation, and it may be opposed by speculation, and there are, besides, countervailing considerations. The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city can not the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government.

* * * * * * *

"In the case at bar restraint upon the power of the appellant city is claimed to be implied by the grant to the appellee. We think, for the reasons stated, and upon the authorities cited, such restraint can not be implied."

In the Hellena case (195 U. S., 648) the opinion defines the contract and states the law as follows:

"Properly construed, we think this ordinance shows an agreement upon the part of the company, to furnish water to the inhabitants of the city, at

not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted, we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant."

The franchise or contract passed on in each of these cases is exactly the same as in the case at bar, provided the word "exclusive" be stricken from the franchise under consideration, and we have already shown that word to be without effect and the franchise to be the same as if it had been omitted. These cases, therefore, put at rest the contention that this defendant, by the Bullock franchise, bound itself not to build a water works plant of its own during the life of that franchise. This being true, the Act of March 9, 1900, could not impair the obligation of the Bullock franchise because the word exclusive, by which alone it is contended such obligation is raised, has no significance whatever, and therefore creates no such obligation.

The water company will not be heard to complain of this construction of the franchise, because it is and was presumed to know the extent of the statutory authority vested in the city, and of its impotency to make an exclusive grant, and that it could not be estopped by any excessive grant to set up its lack of authority. This proposition applies not only to Bullock & Co., to whom the grant was made, but it applies with equal force to the vendees of the said Bullock & Co. The city's authority in the premises was clearly embodied in the published laws of the State, referred to above in this brief, and inasmuch as everyone is presumed to know the law, Bullock & Co. and this complainant must have known that the city had no authority to grant an exclusive fran-

chise, and that any attempt to do so was void. It follows necessarily that the complainant will not now be heard to complain that it is or its vendor was deceived and thereby wronged in any way by the action of the city in attempting to grant an exclusive franchise.

Thus far, we submit, the cases just referred to sustain our position exactly, but there is an element in the case at bar that is not found in the others. In the case at bar there is an agreement on the part of the city to rent ninety fire hydrants for the full term of the franchise, while in the Joplin case there was no agreement for the city to take light at all from the lighting company, and in the Skaneatelles case and the Hellena case, while there was an agreement to take water from each of the said companies for five years of the franchise period, the controversy in each case arose after the expiration of such contracts, but before the expiration of the franchise. In the case at bar the statute authorizing the city to build a water works plant, and all that was done under it, took place, not only during the life of the franchise, but during the life of the contract to take water. By reason of this fact alone complainant undertakes to differentiate the case at bar from the other cases, and contends that defendant, by its agreement to take water during the full period of the franchise, thereby contracted not to build a plant until after the expiration of the franchise. This contention we now undertake to demonstrate, under the reasoning of the foregoing decisions, to be utterly untenable.

The ordinance evidencing the agreement between the defendant city and Bullock & Co. is clearly divisible into two parts: first, that relating to franchise, or the right to come upon and use the streets for the laying of pipes and supplying the city and its inhabitants with

water, and second, that part relating to the purchase of water by the city at a stipulated price, that is, the rental of ninety fire hydrants.

That part of the said ordinance referring to and granting the franchise to Bullock & Company, is set forth in section 1 of the said ordinance, and that part relating to the purchase of the water by the city from the water works company is contained in section 3 of said ordinance. While embraced in the same document, they have no bearing on one another. Under the franchise provision, the city grants to Bullock & Company and their successor, a certain license and privilege in the use of their streets, and under the hydrant rental provision, the city binds itself to rent ninety hydrants and to pay therefor $65 per annum each.

By the terms of the agreement the city is bound to pay for ninety hydrants, on the terms stated, to the end of the franchise period of thirty years, but beyond the ninety hydrants, the city is free to take or not to take water at its pleasure. The question of additional hydrants and of water for sewers and for all other purposes is left open for future agreement.

On first reading of the cases referred to we thought the Court had committed itself to complainant's view, but on a more careful consideration of the cases we now submit, that the opinions quoted above are authority for the contrary view.

The strongest statement in support of complainant's contention is found in the Skaneatelles case, as follows:

> "It would seem in the nature of things that the election of methods was for no longer a time than the law permitted a contract to be made under the method chosen by the village."

In the Hellena case, 195 U. S., 648, Justice Day, after stating the contract said :

> " As thus interpreted we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant."

There is no specific statement in either of these cases that the contract to purchase water evidenced an agreement on the part of the city not to build and operate a plant during the life of the agreement to so purchase water. In both cases it was decided that the agreement to take water for five years did not raise an implied contract not to build a plant during the life of the franchise, but after the expiration of the five years. In effect this is a holding that a contract for a part of the franchise period does not raise an implied contract for the whole of the franchise period.

In the case at bar, the question is exactly the same in principle. Does a contract for a part of the water needed by the city raise an implied contract to take all the water that the city may need from the contracting company? We submit that under the foregoing authorities this must be answered in the negative. If the city of Skaneatelles and the city of Hellena, by agreement to take all the water they needed for part of the franchise period, do not thereby preclude themselves from building a plant to supply themselves with water for the remaining part of such period, certainly by all sound reasoning the City of Vicksburg, by a contract to take part of the water it needs for the full contract period, is not precluded, during the life of the Bullock franchise, from building a plant to supply itself with such additional water as it may need.

An examination of the Act of March 9, 1900, will show that the main purpose of the Act was not to acquire

water works, but sewers, and that the authority given to buy water works was to prevent the great expense of purchasing water for flushing the sewers.

The owners of the Bullock franchise had no right to the sale of water for the sewers. There is no agreement in that contract that the city would take water for the use of sewers when such should be required by its growing demands. If such contract is to be thus enlarged and now fastened on the city and tie its hands for the future, and stop its progress and growth, it is by implication and implication alone.

We have tried at length to demonstrate that the Bullock ordinance does not preclude the defendant from building and operating a water works plant, as it was authorized to do by the Act of March 9, 1900. If we have succeeded, the soundness of said Act is established and the objections thereto answered, for it is self evident that the Act could not impair an obligation which did not, in fact, exist.

It does not follow, even should this Court hold the said Act to be an invasion of complainant's rights, in so far as it authorized the defendant to build water works, and to that extent unconstitutional and void, that complainant must prevail in this action.

In the first place, there has been no such action taken by the city as to warrant the injunction granted by the Court below, in the second place, under the constitution of the State of Mississippi, the complainant's charter was amendable as provided in said Act, and in the third place, the complainant is estopped in *pais* from claiming any relief from the provisions of said Act.

As to the first: The bill does not allege that the city had taken any step toward the construction of a plant, or that it had done any act evidencing an intention to build,

or that it even intended or contemplated building a water works system under the authority conferred by the Act. The sole and only allegation in this regard is the passage of the Act. The city had, under the authority of the Act, ordered and held an election to determine whether or not it would issue the bonds provided for and the majority had voted for the issue. And after this election the city served notice on the complainants of the election and its result and that the city was in position to buy the water works plant and asked for a price on the same.

The holding of the election under the said Act would have taken place just the same whether the city decided to buy the plant owned by the complainant or to build a new one. It could, therefore, be no evidence of an election of methods by the city as to whether it would build a plant or buy that owned by complainant. However, the service of notice on the complainant that the city had voted for the bond issue and was then in position to buy its plant was evidence of the city's determination in the matter. It might afterwards recede from such determination, but if so we must look elsewhere for the evidence of an intention to do so, for we assert boldly that it is not found in this record. The only evidence of an election of methods for providing water under the Act in question is in favor of a purchase of complainant's plant, and that branch of the Act is not alleged to be unconstitutional. So far as the record before us shows, not a step was taken and not a threat made by defendant under that branch of the Act which authorized it to build water works. We submit that the mere passage of the Act, without any action on the part of the city under it, did not warrant the injunction against defendant.

As to the second: The complainant corporation being organized under the Constitution and Laws of the State of Mississippi, was, therefore, subject to the provisions of same. The Constitution provides, in reference to corporations, as follows: (Sec. 178.)

> "Corporations shall be formed under general laws only. The legislature shall have power to alter, amend, or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interest to do so; provided, however, that no injustice shall be done to the stockholders."

The only effect of the Act of March 9, 1900, that is complained of in the bill was the power that it gave the city to acquire and operate a waterworks plant of its own; that is to say, it destroyed the exclusive feature of the franchise granted to Bullock & Company. If this franchise had been granted after the adoption of the Constitution of 1890, it would have been subject to amendment in the same manner and effect as provided in the Act complained of, and this being the case, we submit that complainant, being chartered and organized under the said Constitution, can not enforce any franchise acquired by purchase which the State itself could not at the time grant.

The complainant corporation is the creature of the State; it takes its life and being from the State, and all its powers are the gift of the State. Under the constitutional provisions quoted above, the State has the right to amend its charter in any manner it saw fit, provided no injustice was thereby done to the stockholders.

The act complained of had been passed and was in force at the time complainant received its charter from the State, and it took its charter, subject to the provis-

ions of the Act, and no rights or powers could pass to or be held by the corporation inconsistent with the provisions of the Act.

If correct in this, the complainant company is limited to a showing that the Act works an injustice to its stockholders; but this contention has been by this Court decided against complainant in the case of Hamilton Gas Light & Coke Co. *v.* City of Hamilton, 146 U. S., 253, in which case Justice Harlan said:

> "A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the contract is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke the exclusive character of such privileges, can not be regarded as one imparing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation."

Greenwood *v.* Union Freight R. R. Co. 105 U. S., 13.

Oshkosh Water Works *v.* City of Oshkosh, 187 U. S. 437.

Knoxville Water Co. *v.* Mayor & Aldermen of the City of Knoxville, 189 U. S., 434.

As to the third: Complainant is estopped by the action of its assignor, the Vicksburg Water Supply Co., from predicating any relief on the said act, because said Water Supply Co. was as much responsible for the passage of said Act as the defendant.

The evidence shows beyond cavil that C. R. McFarland, the superintendent of the said Water Supply Co., and the agent and representative of the stockholders of

the same, was actively engaged in procuring the passage of the Act complained of. Upon this point McFarland testifies. (Rec., pp. 313, 314, and 315.)

Int. 21. State how long you had charge of the said water works at Vicksburg, Mississippi, as manager and superintendent of same.

Ans. From October 1, 1889, to August 15, 1900.

Int. 36. State if you were in charge of said water works system in the City of Vicksburg, Mississippi, on the 9th day of March, 1900, at the time the legislature of Mississippi passed a law authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds in the sum of $150,000 to buy or build a water works plant, which said act appears on pages 180, 181, 182, 183 and 184, of the sheet acts of the legislature of the State of Mississippi, for the year 1900, and if you state that you were, state whether or not you had any knowledge of the the said Act before the same was introduced before the legislature of the State of Mississippi?

Ans. I was in charge of the water works plant on the 9th day of March, 1900; I believe I had knowledge of this.

Int. 37. State whether or not you conferred with one or more members of the legislature with regard to said bill and urged its passage with the open and avowed purpose of selling the water works system to the said Mayor and Al lermen of the City of Vicksburg?

Ans. I did urge its passage with the intention of selling the water works plant to the City of Vicksburg.

Int. 38. State, if you know, whether or not at the time from the time said bill was introduced in the legislature up to and including the time when it became a law of the State and for some considerable time thereafter that the Vicksburg Water Supply Company was offering its

entire water works system in the said City of Vicksburg for sale at a sum considerably under one hundred and fifty thousand dollars?

Ans. I do know that to be a fact.

Int. 41. State if at any time from the passage of said act up to the 8th day of August, 1900, you had authority from the holder or owner of said bonds and a controlling interest in said stock, to sell the same to the Mayor and Aldermen of the City of Vicksburg, or any one else, at a price equal to or below the said sum of one hundred and fifty thousand dollars, and if you state that you did, name the person or corporation from whom you obtained such authority and the price at which you were authorized to sell said stock and bonds, or the said system of water works, giving particulars.

Ans. I did have authority to sell at a price less than $150,000. I obtained my authority from the First National Bank of New York City.

After the passage of the Act an election was called by the City Board and held on July 3, 1900, at which it was voted to issue the bonds to purchase or construct a plant.

Some time after this, just on what date does not appear in the record, the city gave notice to the Water Company that it had voted the bonds necessary to buy its plant and asked if the Company was willing to sell, and if so, to name a price. (Rec., p. 30.)

Up to this time all that had been done had not the approval and active co-operation of the water company. At the time the Act complained of was passed, and up to the time that the plant changed hands and passed into the hands of complainant, there was no friction between the city and the water works management. It is in evidence that so long as McFarland operated the

works there was no complaint; in fact, complainant's bill alleges that during about fourteen years of the contract there was no complaint (Rec., p. 4, Sec. 11, of ordinance), and accepting this as true, the contract being signed and dated on November 18, 1886, the first complaint would fall about November 18, 1900. It is therefore clear that the act complained of was passed some months before any complaint was made and that the same was not passed in a spirit of hostility.

We submit that upon the foregoing state of facts the complainant is estopped to complain of the said Act or anything done up to this time, in pursuance of the same. It will not be heard to complain of an Act of legislature passed for its benefit and which its superintendent openly and actively aided in procuring, as shown by the testimony.

The fact that complainant did not then own the plant puts it in no better position. It can take no higher right nor occupy any better position than its vendor, the Vicksburg Water Supply Company, which was attempting to sell to the city when complainant stepped in and made the purchase which defendant was preparing to make.

The case is covered by the decision in the case of Dickson *v.* Calgrove, 100 U. S., 578, where the law of estoppel is clearly stated as follows:

> "The law upon this subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

We submit that under this authority upon the undisputed facts as stated by the witness McFarland and de-

nied by no one, complainant is estopped to predicate any relief upon this Act.

II.

Resolution of the City Council Denying Liability.

Under this head will be considered not only the resolution of the City Council denying liability to pay for hydrant rental, but also the bringing of the suit by the city to cancel the Bullock franchise and contract, the refusal by the city to pay hydrant rental and the report of the water committee to the Board of Mayor and Aldermen, recommending that the city refuse to pay the contract price per hydrant, but that it pay a reasonable price therefor, which the committee submitted to be $50 per hydrant, and the adoption by the board of said report.

These several acts by the city are alleged in complainant's bill to be an attempt to abrogate and take away from complainant its franchise and contract rights and to impair the obligation of its contract with the city, and to have been done partly in pursuance of the Act of the Legislature passed March 9, 1900. (Rec., p. 5.) It is sought by these averments to bring the said acts under the condemnation of the constitutional provision in reference to the impairment of contracts. We shall endeavor to show that the said several acts were not done, even *partly* in pursuance of the Act of the Legislature, and that they are, furthermore, proprietary and not legislative in their nature.

The acts do not, on their face, purport to be in pursuance of the said Act of the Legislature, While the bill filed by the city sets forth the provisions of the legislative Act, we take it that no one would claim that the

averments of the bill could, in legal contemplation, be deemed and considered as legislative action. This constitutional blanket was stretched to its limit when it was made to cover the deliberative action of a city council taken under legislative authority. All the acts by the city set forth above relate to and hinge on the resolution passed by the City Council on November 7, 1900, as follows:

> "*Resolved*, That the mayor be, and he is, hereby instructed to notify the Vicksburg Water Works Company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as shall be necessary to determine the rights of the city in the premises."

There is nothing in the wording of this resolution to connect it in any way with the Act of March 9, 1900. The Act and the resolution of the board of November 7, relate to entirely different subject-matter. The first involves the right of the city to build and operate a plant and the latter the question of the liability to pay hydrant rental under an alleged contract. If the legislative Act impaired the obligation of the contract, it was the franchise feature of the same, viz.: the right of the complainant to exclude competition; but if the resolution of the City Council impaired the obligation of the contract, it was that part of the same which obligated the city to pay the complainant rent for hydrants. We take it that unless the passage of this resolution can in some way be shown to have been in pursuance of the Act of March 9, 1900, it can not be held to violate the obligation of the contract entered into with Bullock & Company.

The constitutional inhibition is against the legislative branch of the government and not against the administrative. In the case of New Orleans Water Works Company *v.* New Orleans Sugar Refining Co., 125 U. S., 18, it is said:

> "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

The legislative Act authorizing the city to buy or build water works was passed, and the action taken by the city under it was completed before complainant owned the water works plant or the Bullock franchise and at a time when a state of harmony existed, while McFarland was superintendent, and while the plant was owned by the Vicksburg Water Supply Company, but the resolution complained of was passed after McFarland had ceased to be superintendent, and after the plant had passed out of the hands of the Vicksburg Water Supply Company, and into the hands of the complainant, the Vicksburg Water Works Company, and after Superintendent Crumpler had assumed the management of the plant. The passing of the said resolution marked the end of the state of harmony which had existed, according to complainant's bill, for about fourteen years, and likewise the beginning of a state of discord and contention.

The city, by its answer, has denied that the resolution was in pursuance of the legislative act, and the city

fathers have denied that they so intended at its passage, and the complainant has offered nothing to warrant such view.

On its face, the resolution is a simple denial of the obligation to pay hydrant rentals, and an authority to bring suit to test the liability but in the meantime offering to pay a reasonable rental for hydrants.

The subsequent action of the city in actually filing suit and in refusing to pay the complainant's next water bill when the same was presented, all support the view that the resolution was nothing more than what it purported to be on its face, a simple denial of liability under a contract, which, at the time, the city denied that complainant had any right to enforce, even if such contract was enforcible, and that fact the city also denied.

Unless the building of a new plant was the moving incentive which led to the passage of the resolution of November 7, 1900, it can not be said that it was passed in pursuance of the Act of March 9, 1900, for that Act, in so far as it related to water works at all, related to the acquisition of a plant, and had no reference whatever to contesting the city's liability under the Bullock contract.

In deciding this case, when it was before this Court, on the question of jurisdiction (See 185 U. S., 65) Justice Shiras said:

> "Whether this Act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the Mayor was instructed to notify the water works company that the Mayor and Aldermen deny any liability upon any contract for the use of the water works hydrants, and the subsequent action

> of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the water works company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question."

As we understand this opinion, it is that the allegations of complainant's bill sufficiently connect the resolution of the Board denying liability with the Act of the legislature authorizing the city to construct water works to raise a Federal question and thereby give jurisdiction. Of course for the purpose of considering jurisdiction, defendant's answer could not be considered. The only question therefore before the Court was whether complainant's bill sufficiently alleged that the resolution of the City Council of November 7th was in pursuance of the authority conferred on the city by the said Act, and the Court held that it was. We take it that the opinion above quoted in no way precludes the reopening of that question, to be considered anew upon the allegations of the bill, the denials of the answer, and the proofs submitted on the hearing. However, the language of the opinion apparently limits the city "to point to some inherent want of legal validity in the contract, or to some

such disregard by the water works company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract."

If the city is to be thus limited, it can never raise the validity of any contract except at the peril of an injunction from the Federal Courts. Surely it was not the intention of this Court to sanction any such doctrine.

We submit that the city at all times and under all circumstances had the right to question the validity of the contract for hydrant rental, provided it was not done in pursuance of legislative authority directing or authorizing the same. How else could the city ever raise the question of its liability to the Water Works Company except by a denial of such liability, and an appeal to the Courts to decide the question? It can not be denied that the city, independently of any act of the legislature, had authority to bring a suit to cancel the contract without incurring liability to an action for the impairment of same. In legal contemplation and effect the resolution did no more. The filing of a suit to cancel the contract was the most emphatic denial of liability. What added effect could there be in embodying in the resolution authorizing suit a denial of liability? If liability was not denied, there could be no reason for bringing a suit to cancel. The denial of liability was nothing more than the justification or reason given by the Board for directing the City Attorney to "take such action as shall be necessary to determine the rights of the city in the premises."

The fact that the Mayor was required to notify complainant of the action of the Board can not change or in any way affect the nature of the action taken. The legal effect of the resolution is the same, whether notice of it was given to complainant or not.

Let us here notice that the decision of the Court is based not alone on the resolution of the Board of November 7, 1900, but as well upon "the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own and in refusing to pay the amount due and payable under the terms of the ordinance." An examination of the record will show that the Court was in error in stating the sequence of the grounds upon which its conclusion is based. The election referred to by which the city was authorized to issue the bonds, in point of fact took place not after, but before the resolution of the Board denying liability, and before the complainant had bought the plant, and before it had commenced to operate the same, the election being held on July 3, 1900. (Rec., p. 55.) The resolution was not passed until November 7, following, four months after the bond election.

There was an election held by the city on December 6, 1900, and referred to in complainant's bill in reference to the charge of conspiracy (Rec., p. 6), but that was a general election for municipal officers and must not be confused with the bond election held five months earlier.

Clearly, the action of the board in holding the election to determine whether or not defendant would issue bonds to buy or build water works had reference to the Act of the legislature of March 9, 1900, and was done in pursuance of the same, and if this had followed the action of the board in denying liability instead of preceding it and had itself been followed by the further action of the board in refusing to pay hydrant rentals, as stated by Justice Shiras in the opinion quoted above, it would have been, at least, persuasive, that all three acts of the board were in pursuance of the same general purpose and authority. The Court having gathered from the

variously commingled allegations of the bill that the bond election was sandwiched between the different resolutions of the board in regard to denial of liability for hydrant rentals and the refusal to pay the same it was but natural to conclude that at least a real, earnest and *bona fide* contention was presented in complainant's bill as to whether or not the action of the board in denying liability was not under and in pursuance of the Act of the legislature of March 9, 1900, and therefore presented a Federal question as to whether or not the obligation of the Bullock contract had been impaired, and if it had, whether complainant was entitled to the relief sought in this action.

We assert with confidence that upon careful examination of the record in this case nothing can be found to warrant the conclusion that the action of the City Council in denying liability to pay hydrant rentals, and in refusing to pay the same, and in bringing suit to cancel the Bullock contract was in pursuance of the legislative authority conferred by the Act of March 9, 1900. We contend further that the said action of the City Council, as detailed above, was purely administrative and proprietary in character and not in any sense legislative, and for that reason could not be held to impair the obligation of any contract.

There is yet another ground for contending that the action of the city in passing the resolution of November 7, 1900, denying liability to pay hydrant rental was legislative, to wit: Sec. 5 of the Bullock ordinance provided that Bullock & Company might "procure the organization of a water works corporation under the laws of any State and may assign to it all the rights and privileges acquired hereunder" and the charter of the Vicksburg Water Supply Company, a corporation organized by

Bullock & Co. to which Bullock & Co. assigned their franchise and contract rights provided that "this corporation shall also have the power to acquire by purchase or otherwise an assignment to it of any contract that the City of Vicksburg may have heretofore entered into with any other person or persons to provide a supply of water to the City of Vicksburg and its inhabitants and of succeeding to and exercising and enjoying all and singular the rights, powers, privileges, advantages, immunities, revenues and profits arising out of or accruing from such contract which said city by ordinance or otherwise may have conferred and granted to said person or persons."

From these it will be seen that the contract between Bullock & Co., and the City of Vicksburg contemplated one assignment by Bullock & Co., to a corporation to be organized by them, and we contend that by stipulating and naming one assignment of this contract all others were thereby precluded, otherwise there could have been no reason whatever for providing both in the contract and in the charter that this particular contract might be assigned by Bullock & Co., to such corporation as Bullock & Co. might organize. If it had been intended that the contract should be assignable, generally, to any person not only by Bullock & Co., but his assignees then there could have been no reason whatever for authorizing an assignment to such company as Bullock and his associates might organize.

Collins *v.* Sherman, 31 Miss., 679.
Gains *v.* Coats, 51 Miss., 335.

We submit that this branch of the case at bar is exactly the same in principle and is controlled by the case of St. Paul Gas Light Co. *v.* City of St. Paul, 181 U. S., 142. The City of St. Paul was under contract with the

St. Paul Gas Light Company to pay interest on the cost of constructing certain gas street lamp posts. The city had ceased to use some of these posts and thereafter denied its liability to pay interest on the cost of constructing such of the posts as it had ceased to use. That part of the resolution denying liability was as follows:

> "That from and after the passage of this resolution no interest be paid by the City of St. Paul to the said St. Paul Gaslight Company on account of the cost of the purchase and equipment of said gas street lamp posts."

It was held that the foregoing resolution did not impair the obligation of the gas company's contract.

In rendering the opinion of this Court, Justice White said:

> "The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its right under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to

perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this Court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

The only difference between the St. Paul resolution and the resolution in the case at bar is that in the case at bar the resolution authorized the City Attorney to take action to protect the city's rights, and directed the Mayor to serve notice of the resolution on the Water Works Company, and neither, we submit, changed the legal significance of the resolution or removed it from the authority of the St. Paul case. We do not contend that the St. Paul case is authority for holding that the city is not liable to pay hydrant rentals. It does not touch that point in the case. All we contend is that under the St. Paul case the resolution complained of does not, and did not at the time, warrant the granting of the injunction perpetuated in the final decree of the Court below.

It may be held that the record in the case at bar fails to show any "inherent want of legal validity in the contract," so far as it pertains to the payment of hydrant rentals. We submit that even admitting the city's liability to pay for these, the injunction was unwarranted, because the resolution and the several other acts done in pursuance of the same were not, in legal contemplation, an impairment of complainant's contract, and without this there is no authority for the injunction. The most that can be said of them is that they gave complainant a right of action against defendant, and on this point the case is equally under the precedent of the St. Paul case quoted above.

III.

Washington Street Sewer.

The ninth ground of complaint stated in complainant's bill, that the city had permitted offal and excrement from water closets to be emptied into the said sewer and discharged through it into the Mississippi River at a point above the intake pipe of the complainant, is not sustained by the evidence. Only one instance is specifically stated in all the evidence taken where the city ever gave authority for the use of said sewer for said purpose. (Rec., p. 309; ans. to int. 16; p. 355, ans. to int. 23; p. 343, ans. to int. 23).

This sewer, when first constructed, emptied into the Mississippi River, afterwards into Lake Centennial, at the foot of First East street. (Rec., p. 221.) The lake at that time had its outlet through West Pass, about four miles from the sewer outlet, into the Mississippi River at a point about a mile above where the water works intake pipe was afterwards located. (Ans. to int. 31, Rec., pp. 322, 323.) In the spring of 1903 the course of the Yazoo River was, by the United States Government, diverted, and the said river, by means of an artificial canal, was made to flow into and through Lake Centennial and to empty into the Mississippi River at a point about half a mile above the water works. (See testimony of Brennan, Rec., p. 242; Streuby, Rec., p. 245, and Butts, Rec., p. 246.) By means of the diversion of the river the sewage was caused to flow into it and thence into the Mississippi River at a point much nearer than before. In addition to this, its velocity was greatly accelerated by the change from the dead water of the lake to the swift current of a living stream. It is not

alleged in complainant's bill, and there is no evidence tending to show that the defendant had anything whatever to do with the change in the Yazoo River whereby the sewage was carried in front of the water works. Without this change the sewage had to pass through Lake Centennial four miles to West Pass, and then one mile down the Mississippi River before it reached the water works. (Testimony of McFarland, ans. to int. 31, Rec., pp. 322, 323.) The lake being without current, there was time for it to settle and purify itself before it emptied into the Mississippi at all, and it then had a mile of current to commingle and diffuse it with the vast volume of that mighty stream, so that by the time it reached the water works it was devoid of contamination.

It is not alleged in the bill, nor does any witness testify, that there was the remotest danger of contamination by this sewer up to the time of the diversion of the Yazoo River, which diversion took place after the filing of this suit, the suit having been filed on February 16, 1901, while the diversion did not take place until February, 1903. (Rec., p. 273, Ans. to X-Int. 43; see also communication of complainant to city council, R., p. 219–20.) Nor is it alleged, nor has any witness testified, that the city has authorized any connections with the said sewer since the diversion of the Yazoo River. Upon this state of facts the Court below rendered the following remarkable decree:

> "That the said defendant be and he is hereby enjoined from permitting any further connections for the conveyance of sewage or excremental matter, with the storm sewer or culvert located on Washington street, City of Vicksburg, and the defendant is hereby directed and commanded within twelve months from this date to extend said sewer or culvert and construct an outlet therefor, so as to

> discharge said sewrage and excremental matter into the Yazoo or Mississippi River below the intake pipe of complainant; provided, that if the defendant is unable to construct or extend said sewer or culvert and construct said outlet within twelve months from this date, it can apply to this Court for good cause shown for an extension of time beyond the said period of twelve months."

We take it that no argument is necessary to demonstrate the unsoundness of this decree. In the first place, it is not supported by facts, and in the second place, it is a transgression by the Court of the authority reposed in a co-ordinate branch of the Government. It was held by this Court at an early date that the judiciary could not in any manner interfere with the legislative or executive departments of the government to restrain either from action or to compel action by either where any discretion is vested in either of the co-ordinates.

In the case of Mississippi *v.* Johnson, 71 U. S., 475, the Court said:

> "The Congress is the Legislative Department of the Government; the President is the Executive Department. Neither can be restrained in its action by the Judicial Department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.
>
> The impropriety of such interference will be clearly seen upon consideration of its possible consequences.
>
> Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the Court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the Executive and Legislative Departments of the Govern-

ment? May not the House of Representatives impeach the President for such refusal? And in that case, could this Court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this Court to arrest proceedings in that Court?"

The same doctrine is laid down in Cooley's Constitutional Limitations, Fifth Ed., p. 254, as follows:

> "As no State does or can undertake to protect its people against incidental injuries resulting from its adopting or failing to adopt any proposed legislative action, so no similar injury resulting from municipal legislative action or nonaction can be made the basis of a legal claim against a municipal corporation. The justice or propriety of its opening or discontinuing a street, of its paving or refusing to pave a thoroughfare or alley, of its erecting a desired public building, of its adopting one plan for a public building or work rather than another, or of the exercise of any other discretionary authority committed to it as a part of the governmental machinery of the State, is not suffered to be brought in question in an action at law, and submitted to the determination of court and jury. If, therefore, a city temporarily suspends useful legislation; or orders and constructs public works, from which incidental injury results to individuals; or adopts unsuitable or insufficient plans for public bridges, buildings, sewers, or other public works, or in any other manner, through the exercise or failure to exercise its political authority, causes incidental injury to individuals, an action will not lie for such injury."

In view of these authorities, the decree above referred to is clearly erroneous. It compels legislation on the part of the city by requiring it to construct a sewer some

two or three miles in length, extending beyond the corporate limits about three quarters of a mile, and into or through the corporate limits of another municipality, to wit: the village of Speed's Addition. (Rec. p. 272).

On page 272 of the Record appear questions to and answers by Mr. Crumpler, superintendent of the water works company, as follows:

X-Int. 37. How far is your intake pipe below and south of the southern limits of the City of Vicksburg?

A. I think something like three-fourths of a mile.

X-Int. 38. And is it not due west or opposite the village of Speed's Addition?

A. I am under the impression that we are now in the city of Speed's Addition. I don't know exactly where the limits are.

It does not appear from the Record that the city had authority to acquire a right of way beyond its corporate limits, and as the city could possess no authority, except by the legislative act of the State, and since there was no act giving authority (and the court will take judicial knowledge of the acts of the legislature), it may here be said that the city had no authority to acquire or condemn a right of way beyond its corporate limits.

The decree, therefore, required the city to legislate upon a subject upon which it was wholly incapacitated to legislate, and any action it might take in pursuance of said decree, toward constructing a sewer beyond its limits, would be *ultra vires* and void.

The question of the feasibility of constructing the sewer commanded by the decree is purely governmental, and involves legislative discretion.

For aught that appears in this Record, the said sewer is impossible of construction. The route may be through rock, or it may be along an ascending plain, or if along

a declining plain, it may lack sufficient fall to free itself. Moreover, it does not appear that the city has funds to comply with the decree, and, if not, it compels the exercise of the taxing power, which undoubtedly is legislative.

The decree is clearly in violation of the fundamental principles of this Government, whereby the co-ordinate branches of the Government are each made sovereign in in its own department. It is quite one thing for a court to declare the acts of a legislative body void because in violation of some constitutional provision or some fundamental right, and quite another for a court to undertake, through the extraordinary remedy of a mandatory injunction, to compel a legislative body to act in matters involving legislative discretion.

If the city did any wrong to the Water Works Company, or transgressed any of its rights in permitting sewage matter to be emptied into said Washington street sewer, the limit of the relief possible to complainant in this suit would be to declare the action of the city in giving such permit void, and restrain it from giving a like permit in the future.

Sale of Interest by Complainant Pendente Lite and Issues Raised Thereby.

Having considered the issues pertaining to the merits of this cause, we come now to consider the issues growing out of the sale by complainant of the subject-matter involved, during the progress of the suit.

This suit was filed in February, 1901, and on the 29th day of July, 1903, complainant sold the water works, franchise and contracts belonging to it and forming the subject-matter of the cause to the City Water Works & Light Company (Rec., pp. 103–112,–171–270 and 271),

and on December 1st following, the said purchaser went into possession of the plant and commenced to supply the City of Vicksburg with water (Rec., 271, 272). The final decree herein was rendered on May 18, 1904. Upon this point, Mr. Crumpler, witness for complainant and Superintendent of the Water Works Company testified (Rec., pp. 271, 272):

X-Int. 17. Has that Company continued since August 15, 1900, to own and operate a water works system in this city?

Ans. Yes, sir; up to a few months ago when a transfer was made to the City Water Works & Light Company.

X-Int. 18. The City Water Works and Light Company then, is a corporation and now owns and is now operating the water works plant and system in this city?

Ans. It is.

X-Int. 19. Is the City Water Works & Light Company a corporation organized under the laws of the State of Mississippi, or under the laws of some other State, and if under the laws of some other State, what State?

Ans. It is under the laws of South Dakota.

X-Int. 20: What connection, if any, has the Vicksburg Water Works Company now with the property and management of the water works system now engaged in supplying water to the defendant and inhabitants of the City of Vicksburg?

Ans: None.

X-Int. 21: It has parted with all of its interest then in the plant that is now being used to supply water to the City of Vicksburg and its inhabitants?

Ans: Yes sir:

X-Int. 22: It is not now the owner of the franchise or of the contract originally made with S. R. Bullock &

Company to supply water to the City of Vicksburg and its inhabitants?

Ans: It is not.

At the time of taking Crumpler's deposition the petition of the City Water Works & Light Company, praying to be admitted as party complainant in place of the Vicksburg Water Works Company, was on file with the papers in the cause (Rec. pp. 102–105 inc.), but no process had been issued on the same, nor had any order been made by the Court in reference to the same.

On May 5th, 1904, defendant filed an answer to said petition, denying that said City Water Works & Light Company was then the owner of the plant, franchise and contracts, as set up in its said petition. (Rec. p. 117).

On the same day the said City Water Works & Light Company filed in this cause a paper denominated, "An Original Bill in the nature of a Supplemental Bill" (Rec. p. 112), and with it complainant filed its written consent to the substitution of said Water Works & Light Company in place of itself as complainant. (Rec. p. 110).

It does not appear that defendant filed an answer to this bill. However, on May 11th, there was filed a paper purporting to be a motion by the City Water Works & Light Company for leave to withdraw its petition, praying to be admitted as party complainant, and its original bill in the nature of a supplemental bill, and by the complainant for leave to withdraw its consent to the substitution of the City Water Works & Light Company as party complainant in place of itself, same being as follows: (Rec. p. 169.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI—*Western Division.*

VICKSBURG WATER WORKS COMPANY

v.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.

"And now comes the City Water & Light Company and the said City Water & Light Company, and the said move the Court for leave to withdraw from the files:

"1st. Its petition filed December 2, 1903.

"2d. Its original bill in the nature of a supplemental bill filed May 5, 1904, and all exhibits to said bill and petition.

"And the said Vicksburg Water Works Company also moves the Court for leave to withdraw its written consent to the filing of said bill from the files.

"HUDSON & FOX AND
"SMITH, HIRSH & LANDAU,
"*Sols. for Vicksburg Water Works Co. and*
"*City Water & Light Co.*"

On May 13, 1905, the Court granted this motion by order set forth in complainant's first assignment of error (Rec., p. 170).

On May 13th defendant moved the Court for leave to file a supplemental answer setting forth the attempted sale by complainant to the City Water Works & Light Company, and that complainant had thereby incapacitated itself to proceed with the cause and had become a corporate waif and derelict and denying that the City Water Works & Light Company had acquired the property rights of complainant under the so-called sale and transfer, or that it had been subrogated to the rights

of complainant in this cause and praying for a continuance to allow time for the proof of the facts alleged (Rec., p. 171). This motion was overruled by the Court in the following order (Rec., p. 179):

> "This day came on to be heard defendant't motion, this day filed, for leave to file the supplemental answer attached to the said motion and for a continuance with leave to take testimony in support of the allegations of the said supplemental answer, and the Court having heard the arguments of counsel, and being advised in the premises, it is considered that the said motion be and is hereby overruled.
>
> So ordered this 13th day of May, 1904.
>
> H. C. NILES, *Judge.*

On the same day complainant moved the Court to suppress the questions and answers propounded to and made by M. O. Crumpler and set forth in the fourth assignment of error, and on May 18 this motion was granted and the evidence suppressed. (Rec., 179.)

The first error assigned involves the right to have a pending suit decapitated by allowing the only party complainant with any interest in the subject-matter of the suit to withdraw. From that time forward the suit progressed without a living complainant. The Vicksburg Water Works Company had not only sold its plant and franchise, but to all intents and purposes it had passed out of existence, being kept alive only for the purpose of collecting a few accounts, as shown by the testimony set forth in the fourth assignment of error.

In passing on the right of a sole complainant to proceed with a suit after parting with all interest in the same, Circuit Judge Woods, in the case of Ross *v.* City of Fort Wayne, 63 Fed. Rep., 466, said:

> "Walker having parted with all interest * * * * could not prosecute the suit further, and abatement

was inevitable unless a new plaintiff could be substituted."

To the same effect is the opinion of Judge Hammond in the case of Hazleton-Tripod Boiler Co. *v.* Citizen's Street Railway Company, 72 Fed. Rep., 327, as follows:

> "Owing to familiar principles of equity, somewhat different in proceedings at law, a decree will not be made in favor of a plaintiff who has no interest in the subject-matter of the decree. Therefore, if the plaintiff, by any alienation, so absolutely divests himself of all interest as to leave nothing for him to take, the suit becomes not abated as it might be at law, but defective; and, until the party having the proper right is in some way brought before the Court, the case can not proceed after the fact of alienation has been, in proper form, brought to the attention of the Court."

To the same effect we find the text in Bates' Federal Equity Procedure, Vol. 2, Sec. 642, page 682, as follows:

> "It is firmly asserted that a suit in equity must be prosecuted by and in the name of the party in interest. When the sole plaintiff, suing in his own right, is deprived of his whole interest in the matters in controversy by an event subsequent to the institution of the suit, as where the plaintiff has assigned his whole interest to another, the plaintiff is no longer able to prosecute the suit for want of interest; and as the assignor claims by a title which may be litigated, the benefit of the proceeding in the cause by the assignor can be obtained by the assignee only by an original bill in the nature of a supplemental bill."

In view of these authorities, we submit that it was clearly error to allow the withdrawal of the petition and original bill in the nature of a supplemental bill.

This error would have been cured had the court allowed defendant to file its supplemental answer, which was, in fact, an original bill in the nature of a supple-

mental answer, though not so designed by the pleader. Upon this refusal is predicated defendant's second assignment of error. This involves exactly the same proposition of law as the first assignment argued above, and the same authorities apply, but in addition it raises the right of a defendant to set up the defect in the suit produced by the complainant parting with all interest and thereby incapacitating itself to proceed with the cause.

That the defendant had such right is made clear by the very nature of the transaction. The sale or assignment was made by one corporation to another, both creatures of the State, endowed with such rights and powers only as the law conferred on them. It did not follow as a matter of law that the instrument of conveyance executed by complainant and delivered to the City Water Works & Light Company, and attached to defendant's supplemental answer as an exhibit, was sufficient to vest all interest in the subject-matter of the suit in the said City Water Works & Light Company, and if it did not, the defendant had a right to take advantage of such defect, and this it could not do unless permitted to file a supplemental answer setting up such facts or a bill in the nature of a supplemental answer setting up the same.

Equity Rule No. 57, we take it, covers the case:

> "Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the Court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the

> defendant shall demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the Court."

While this rule does not in terms provide who shall have the right to file a supplemental bill or an original bill in the nature of a supplemental bill, we take it that either the party purchasing or the defendant may file the same. In other words, any one having an interest in the suit may file the same.

In Pue *v.* Pue, 4 Md., Ch. 386, it was held that the defendant could file such bill.

In the case of Hazleton-Tripod Boiler Co. *v.* Citizen's Street Railway Company, referred to above, Judge Hammond used this language:

> "If the defendant in this case should, by proper petition, or by supplemental proceeding, appropriate to the purpose, bring to the Court a knowledge of the fact of this alleged transfer of the property involved, and of the assignment by the plaintiff of its interest in the boiler contract, the Court would direct the cause to stand over until, by proper proceedings, the party in interest should appear and demand a decree."

While this may be no more than an expression of opinion on the effect of the rule above quoted, it certainly shows that Judge Hammond considered that a defendant had the right to set up the fact of sale of interest, and to take whatever advantage might flow to the defendant by reason of such sale.

We submit that it was error to overrule defendant's motion for leave to file its supplemental answer.

If the defendant had the right to file its supplemental answer it had the right to time within which to take testimony to substantiate the same, and hence had a right to a continuance for that purpose.

The fourth assignment of error involves the suppression of testimony to the effect that the complainant had parted with all interest in the water works plant and the Bullock franchise and contracts, and had surrendered possession of the plant, and was not at the time fulfilling the Bullock contract by supplying the city with water, but that complainant had surrendered that duty to the City Water Works & Light Company.

This testimony was admissible under any just construction of the issues regardless of whether the Court permitted the withdrawal of the petition or the original bill in the nature of a supplemental bill of the City Water Works & Light Company or not, or whether the Court permitted the filing of defendant's supplemental answer.

The testimony went to the very heart of complainant's right to a decree, and showed that the complainant was not entitled to a decree because it had no interest in the subject-matter of the suit.

It furthermore showed that the complainant was not fulfilling the Bullock contract by supplying the city with water; that it had been derelict in that duty for more than six months—from December 3d to May 18th following.

Certainly this testimony was admissible to show that complainant was not entitled to the mandatory injunction which perpetuated the final decree compelling defendant to pay hydrant rental to complainant, when, as a matter of fact, the water was being furnished by another company.

The defendant is enjoined for refusing to pay complainant's hydrant rentals under the Bullock franchise and contract, and this testimony showed conclusively that complainant has no interest in the Bullock contract,

and, as a matter of fact, was not furnishing water under it to the defendant city, and yet it was excluded by the Court, and the mandatory injunction requiring defendant to continue paying the complainant for services it was not rendering was made perpetual.

We submit that no Appellate Court can overlook such clear error.

Respectfully submitted,

J. C. BRYSON,
Counsel for Appellant.

BRYSON & DABNEY,
Of Counsel.

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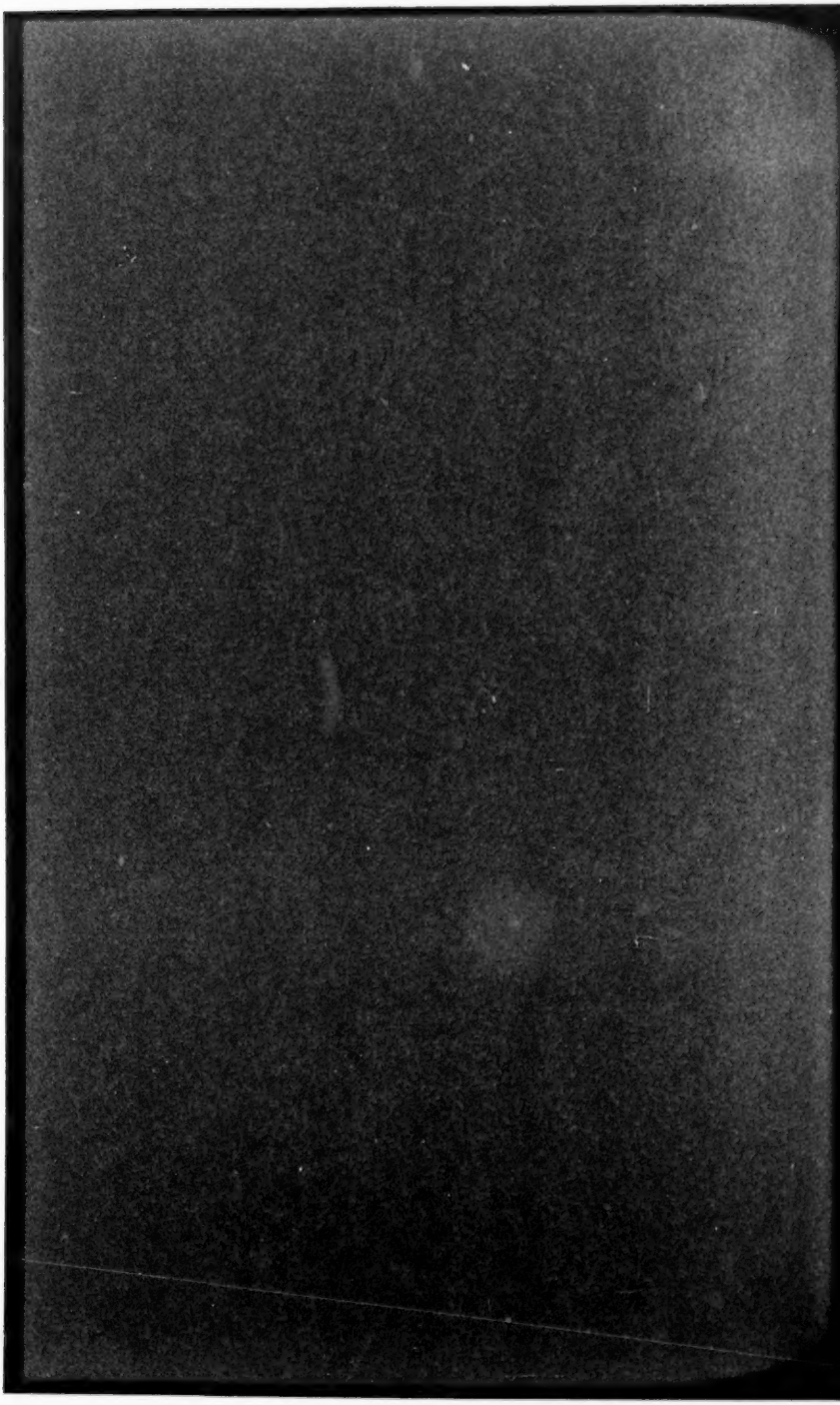
SUPREME COURT OF THE UNITED STATES.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 133.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANT,

vs.

THE VICKSBURG WATER WORKS COMPANY, APPELLEE.

BRIEF OF APPELLANT ON MOTION TO DISMISS AND AFFIRM.

MOTION TO DISMISS AND AFFIRM.

In the Supreme Court. October Term, 1905.

Mayor and Aldermen of the City of Vicksburg, Appellant.

vs.

The Vicksburg Water Works Company, Appellee.

Comes now Appellee by its counsel appearing in that behalf and moves the court to dismiss the appeal in the above entitled cause for want of jurisdiction or right of appeal direct from the United States Circuit Court where this appeal is taken from, because the only questions involved are questions that should be decided by the United States Circuit Court of Appeals, and the case should have been

appealed to that court. Therefore this appeal should be dismissed.

2nd. Because said final decree appealed from was entered in strict accordance with the mandate of the Supreme Court of the United States dated the 7th of April, 1902, in the case of The Vicksburg Water Works Company vs. The Mayor and Aldermen of the City of Vicksburg, 185, U. S. 65.

3rd. The case should be dismissed because the assignment of errors, are not signed by appellant or its attorney.

4th. The case should be dismissed because the clerk's certificate on its face shows that a certain exhibit is left out and therefore there is not a complete transcript of the record as required by the rules.

And said appellee by counsel as aforesaid also moves the court to affirm said judgment or decree from which said appeal purports to have been taken because although the record may show that this court has jurisdiction of this appeal yet it is manifest that said appeal is frivolous and was taken for delay only.

HUDSON & FOX,
SMITH, HIRSH & LANDAU,
Attorneys for Motion.

I. STATEMENT OF THE CASE.

During the year 1870 the City of Vicksburg constructed a sewer along Washington Street from Veto Street to Main Street and along Main Street to the Mississippi River, where it had its outlet. This sewer was constructed solely for the purpose of carrying off surface or rain water and was so used until the construction of the present system of water works in the City of Vicksburg in 1887. (R. p. 222.)

On March 18th, 1886 the Legislature of the State of Mississippi amended the charter of the City of Vicksburg so as to authorize it to provide for the erection and maintenance

of a system of water works. The exact language of the amendment is as follows:

"To provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with a party or parties who shall build and operate water works."

Laws of Mississippi 1886, page 694.

In pursuance of this amendment the Board of Mayor and Aldermen of the City of Vicksburg on November 18th, 1886, adopted an ordinance granting to Samuel R. Bullock & Company, their associates, successors and assigns, the right and privilege to construct and operate a water works system in the City of Vicksburg for the period of thirty years from the date of said ordinance. The ordinance is set out in full in the record at pages 15-20. The parts of said ordinance which are involved in this controversy are as follows:

"SECTION 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be in its jurisdiction, for the purpose of laying pipes, mains and other conduits, of erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good and wholesome water to the city of Vicksburg, Mississippi, and to its inhabitants for public and private use."

* * * * R. p. 15.

"SECTION 2. Source of Supply. * * * The water shall be taken from such point as shall be free from all sewerage contamination." R. p. 17.

"SECTION 3. In consideration of the public benefit and the protection of property resulting from the construction

" of the said system of water works the Mayor and Alder-
" men of the city of Vicksburg hereby rent of the said
" Samuel R. Bullock & Company, their associates, success-
" ors and assigns, not less than eighty double-nozzle, frost-
" proof fire hydrants for the aforesaid period of thirty years
" at the annual rental of $65.00 for each hydrant, to be pay-
" able semi-annually on the 15th days of January and July.
" After the first year of the operation of said water works
" the said city hereby rents not less than ten hydrants in
" addition to the said eighty, for the unexpired period of
" said thirty years; the first hundred shall be located on the
" original twelve miles of mains at said annual rental of
" $65.00, payable as aforesaid, and for the remainder of
" said period of thirty years unexpired at the time of plac-
" ing each of said hydrants." * * * * R. p. 17.

"SECTION 5. The said Samuel R. Bullock & Company,
" their associates, successors and assigns, may procure the
" organization of a water works corporation under the laws
" of any state, and may assign all the rights and privileges
" assigned to them hereunder. Provided that such assign-
" ment shall not invalidate or affect the bond required by
" Section 7 hereof, and no assignment thereof shall be valid
" unless such assignee shall in writing to said Board of
" Mayor and Aldermen accept this ordinance and become
" bound by its terms and obligations." R. P. 17.

"SECTION 13. The said Samuel R. Bullock & Company,
" their associates, successors and assigns, shall have the
" right to make all needful rules and regulations governing
" the consumption of water, the tapping of pipes and general
" operation of water works, and to make such rates and
" charges for the use of said water as they may determine,
" provided that such rates and charges shall not exceed 50
" cents for each thousand gallons of water. R. P. 20.

Pursuant to the authority contained in Section 5 of the aforesaid ordinance the said Samuel R. Bullock & Company did on Feb. 1st, 1887, procure the organization of a water works company under the general statutory laws of the State of Mississippi, known as the Vicksburg Water Supply Company, (R. p.p. 21-24) and on the 1st day of March, 1887 they, in pursuance of the authority contained in said Section 5 aforesaid, assigned, transferred, and set over to the Vicksburg Water Supply Company and its successors and assigns, all of their right, title and interest in and to the ordinance

of Nov. 18th, 1886, aforesaid, thereby substituting the said Vicksburg Water Supply Company in the place and stead of the said Samuel R. Bullock & Company. On the same day the Vicksburg Water Supply Company in writing duly notified the Mayor and Aldermen of the City of Vicksburg of its acceptance of said ordinance and agreed to be bound by its terms and obligations. R. p. 26.

Upon its purchase from Samuel R. Bullock & Company as aforesaid, the Vicksburg Water Supply Company executed a mortgage to the Farmers Loan & Trust Company of New York City, as trustee, to secure the payment of an issue of $250,000.00 of its first mortgage 6 per cent. thirty year gold bonds, presumably for the purpose of raising money with which to construct the water works. R. p.p. 32-40. By said deed of trust the Vicksburg Water Supply Company conveyed to the Farmers Loan and Trust Company as trustee as aforesaid, and its successors forever, all of its real and personal property, goods, chattles, lands, rents, water works buildings, pump houses, stand-pipes, hydrants, apparatus and equipments, situated in the City of Vicksburg, County of Warren and State of Mississippi, etc., etc., but did not, by express terms, convey its rights and privileges under the ordinance of Nov. 18th, 1886. R. p.p. 33-34.

The Vicksburg Water Supply Company thereupon proceeded to construct and did construct a water works substantially in conformity with the ordinance of Nov. 18th, 1886, and the same was on March 27th, 1887, by a resolution of the Board of Mayor and Aldermen of the City of Vicksburg, duly approved and accepted. R. p. 291.

After the water works were completed in March 1887, the Vicksburg Water Supply Company begun the operation of the system and continued to operate it up to about the 15th of August, 1900, a period of about thirteen years; during which time the company furnished water to the City of Vicksburg and its inhabitants, but whether the supply was adequate and wholesome, and whether it otherwise complied with the provisions of said ordinance are questions which this court is called upon to decide. During all this time the

City of Vicksburg paid the agreed hydrant rental of $65.00 per annum as provided for in said ordinance.

The water works was not a financial success, and in the summer and fall of 1899 or in the early part of 1900 negotiations were opened between the First National Bank of New York City, the owner of the bonds, through Chester R. McFarland, the then superintendent of the water works company in Vicksburg, with the Mayor and Aldermen of the City of Vicksburg, looking to a sale by the company of said water works to the City of Vicksburg, and the plant was offered to the city at a sum considerably under $150,000.00, though the exact figure is not given by the evidence. See depositions of W. L. Trobridge, R. p. 305; Chester R. McFarland, R. p. 311; J. J. Hayes, R. p. 330; D. A. Campbell, R. p. 336.

The city, desiring to put itself in a position to purchase the property, with the knowledge and consent of the said Chester R. McFarland, applied to the Legislature of the State of Mississippi for authority to issue bonds to raise the money to make the purchase, and on March 9th, 1900, the Legislature of Mississippi enacted a law authorizing the City of Vicksburg to buy or build a water works and sewerage system of its own, and to issue bonds for that purpose. The material parts of the act are as follows:

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi:* That the Mayor and Aldermen of the City of Vicksburg shall have and they are hereby authorized and empowered to issue, negotiate and sell the bonds of said city in any sum not to exceed $375,000.00. * *

"SECTION 2. The proceeds derived from the sale of said bonds shall be applied as follows: $150,000.00, or so much thereof as may be necessary for the purchase of the present power plant and system of water works now owned and operated by the Vicksburg Water Works Company, if the said Mayor and Aldermen deem such purchase to be for the best interest of the said city. Otherwise, they are hereby authorized and empowered to use and apply the said amount, or so much thereof as may be necessary for the construction, establishment and maintenance of a new and complete system of water works

" to be owned, maintained and operated by said City of " Vicksburg. $150,000.00, or so much thereof as may be " necessary for the construction of a system of sewerage in " said city, which said system when constructed shall be " and thereafter continue the property of said city. The " said Board of Mayor and Aldermen are hereby authorized " and empowered to adopt such plans and specifications for " the construction of said water works and sewerage system " as to them may seem proper, and may enter into a con- " tract for the construction or purchase of the same, and " may make payment therefor in accordance with the pro- " visions of this act. But said bonds so provided for the " construction of a sewerage system shall not be issued nor " sold until said Mayor and Aldermen shall have first pro- " vided for the purchase or establishment of a system of " water works as are here provided. * * * *

" Before any bonds shall be issued under the authority of " this act the said Mayor and Alderman shall give twenty (20) " days notice of an election to be held in the manner pro- " vided by law for the election of municipal officers, by " publication in some newspaper printed and published in " said city naming the date thereof, and the amount of " bonds to be issued, and the purpose or purposes for which " they are to be issued, and if a majority of the votes cast " at said election be cast in favor of the issuance of said " bonds, then the Mayor and Aldermen of said city shall be " fully authorized and empowered to issue, negotiate and " sell the same as above provided." Laws Miss. 1900, p. 180.

The Board of Mayor and Aldermen, in pursuance of said act, ordered an election to authorize the issuance of the bonds, and on July 3rd, 1900, an election was held and resulted in favor of the issuance of the bonds. R . p.p. 55–56.

About the time this election was held M. O. Crumpler purchased the bonds issued by the Vicksburg Water Supply Company and held by the First National Bank of New York City, and procured the advertisement and sale of the property mentioned and described in the deed of trust to the Farmers Loan & Trust Company above mentioned, and at the sale which took place on the 8th day of August, 1900, bid in the property described in said deed of trust (R. p.p. 295–300), but subsequently and before the deed was made to him, assigned his bid to the Vicksburg Water Works Company,

the complainant in this case, and the deed was accordingly made to the Vicksburg Water Works Company. (R. p. 297, par. 3.) When this company was chartered and organized, and for what purpose, and what its powers were, the Record fails to disclose.

On the 18th day of October, 1900, the Vicksburg Water Supply Company, by Whitney Conant, its president, conveyed by quit-claim deed, all the property mentioned and described in the deed of trust to the Farmers Loan & Trust Company to the Vicksburg Water Works Company, presumably for the purpose of perfecting the title of the Vicksburg Water Works Company to all the property, real and personal, theretofore owned by the Vicksburg Water Supply Company. In this conveyance special reference is made to the contract with the city, embraced in the ordinance of Nov. 18th, 1886, and an effort was made to convey that also. The Vicksburg Water Works Company thereupon on Nov. 20th, 1900, notified the Board of Mayor and Aldermen of the City of Vicksburg in writing in accordance with Section 5 of said ordinance, that they had purchased the property and plant of the Vicksburg Water Supply Company, including the contract of Nov. 18th, 1886, and agreed to become bound by its terms and obligations; but the Board of Mayor and Aldermen refused to recognize or approve the sale to them upon the ground that the Vicksburg Water Supply Company had no right or power to sell and from that time to the present have consistently and persistently refused to recognize the Vicksburg Water Works Company as the owner of the contract of Nov. 18th, 1886, and refused to treat with them as such.

On August 15th, 1900, the Vicksburg Water Works Company took possession of the plant and begun operating the same, supplying the City of Vicksburg with water for its fire hydrants and also supplying the individual consumers of water, for which it fixed the rates. (R. p. 270 and 304.)

Shortly after the bonds had been voted by the tax payers of the City of Vicksburg the Mayor and Aldermen, in pursuance of their negotiations with the First National Bank of

New York City, had through Chester R. McFarland, passed the following resolution:

"*Resolved*, that the water works committee is instructed " to notify the present owners of the Vicksburg water " works that the City of Vicksburg is authorized by law to " purchase or build a water works system, not to exceed in " value $150,000.00, including all the expenses of engineer- " ing, supervision, etc., etc., and that said committee re- " quests the owners of said water works to say whether or " not they are willing to sell their plant, machinery and " system complete to the city, and if yea name a price at " which they would be willing to sell, and naming a time " within which the city shall have an option to purchase " the same, giving the city authorities full time to investi- " gate by competent engineers the condition of the system " as to repairs and affording them ample opportunity to " ascertain its present value, the answer to be presented in " writing at as early a day as possible for the action of this " body."

A copy of this resolution was submitted to the owners of the water works company, but they declined to sell and made a counter proposition looking to the building by themselves of the sewerage system mentioned in the act of March 9th, 1900, and the sale of the water works system and the sewerage system to be so constructed by them, for the $300,000.00 of bonds authorized to be issued under that act, which was not acceptable to the Board of Mayor and Aldermen, and no sale was consummated.

On Nov. 7th, 1900, the Board of Mayor and Aldermen of the City of Vicksburg passed the following resolution, to-wit:

"*Resolved*, that the Mayor be and he is hereby instructed " to notify the Vicksburg Water Works Company that the " Mayor and Aldermen deny any liability for the use of the " water hydrants; that from and after August, 1900, they " will pay a reasonable compensation for the use of said " hydrants; that the city attorney take such action as shall " be necessary to determine the rights of the city in the " premises." R. p. 30.

A copy of this resolution was served upon the Water Works Company, and a committee appointed to determine what the fire hydrants were reasonably worth per annum, which committee subsequently reported that $50.00 per annum would be fair and reasonable for the use of said hydrants, which report was adopted by the board.

On Dec. 6th, 1900, the Board of Mayor and Aldermen of the City of Vicksburg, through their attorney, brought a suit against the Vicksburg Water Works Company in the Chancery Court of Warren County, Mississippi, to test the validity of the ordinance of Nov. 18th, 1886, and their liability thereunder to the Vicksburg Water Works Company, on various grounds (R. p.p. 40-51) which will be found repeated in the answer filed to the bill in this case on Jan. 21st, 1901, (R. p.p. 63-78,) and need not be stated here.

From the time the water works were constructed in 1887, up to the time of the filing of the bill in this case, a number of persons along Washington Street connected their stores and other premises with the storm sewer on Washington Street, and caused the sewerage and other excremental matter from their premises to flow into this storm sewer and thence into the Mississipi River about two miles above the intake pipe of the complainant. A great many of these connections were made while the Vicksburg Water Supply Company was the owner of the plant, and the evidence shows conclusively that they were made with its consent and connivance. Some few were made with the permission of the Board of Mayor and Aldermen. Many others were made without their knowledge or consent.

By its original bill, filed herein Feb. 16th, 1901, (R. p.p. 1-51) and its amended and supplemental bill, filed April 23d, following (R. p.p. 55-57) the complainant set out the foregoing facts, among others, and claimed; that the ordinance of Nov. 18th, 1886, was in full force and effect, notwithstanding the denial thereof by the Board of Mayor and Aldermen of the City of Vicksburg; that the complainant was the owner of the contract, evidenced by the sale made August 1st, 1900, under the deed of trust to the Farmers

Loan & Trust Company and the quit-claim deed of the Vicksburg Water Supply Company, made August 15th, 1900, and the owner of all the rights and privileges granted to Samuel R. Bullock & Company by said ordinance; that complainant had complied faithfully with all the terms and conditions of said contract, including the obligation to furnish an adequate supply of good and wholesome water and to keep the pressure high enough to protect against fire, etc., etc.; that it was entitled to collect and receive the hydrant rentals at the contract price of $65.00 per annum from August 1st, 1900, to the filing of the bill, and so long as the contract was in force and it was the owner thereof; that the appellant, in procuring the passage of the act of the Legislature of Mississippi of March 9th, 1900, providing for the issuing of bonds to buy or build a water works, in the holding of the election thereunder, and the denial of liability for the hydrant rental, was preparing to build a water works system of its own and to operate the same in competition with complainant; that this purpose, if carried out, would have the effect to impair complainant's contract of Nov. 18th, 1886, and deprive it of all benefit thereunder; that the act of the Legislature of March 9th, 1900, under which these several steps were taken, was unconstitutional in that it was one step in a gereral scheme to impair complainant's contract rights under the ordinance of Nov. 18th, 1886. The complainant prayed for an injunction, which was granted, but as the injnnction is repeated snbstantially in the final decree of the Court below in this case, it is not necessary to set it out here. (R. p. 53.)

The answer of the Mayor and Aldermen of the City of Vicksburg, filed Jan. 21st, 1901, (R. p.p. 63-79) admitted numerous allegations of the bill and denied others, but defended the case substantially upon the following grounds:

1st. That the Court below was without jurisdiction to try the case.

2nd. That the ordinance of Nov. 18th, 1886, was void because it was not passed pursuant to the advertisement

for bidders, as required by the city charter of the City of Vicksburg.

3rd. Because the contract was personal and not assignable, and the complainant had not and could not acquire the same.

4th. That complainant could not collect the hydrant rentals because they were unreasonable and extortionate.

5th. Because the state had the right to regulate the rates to be charged by the Water Works Company, both to the City of Vicksburg and to the individual consumers.

6th. Because the city had the right to build a water works under the contract, if it saw fit to do so.

7th. Because the complainant had forfeited its contract by not having complied with its terms and obligations, in that it had not furnished an adequate supply of good and wholesome water and had not furnished sufficient pressure for the fire hydrants.

The case was tried in the court below solely on the question of jurisdiction. The learned judge decided that he did not have jurisdiction and dismissed the case for that reason. An appeal was taken to the Supreme Court, and the case was reversed and remanded to the Court below with instructions to proceed to try the case on its merits. 185 U. S., p. 65, et seq.

On Dec. 2nd, 1903, the City Water Works and Light Company, a South Dakota corporation, filed its petition in the case, alleging that it had purchased all the property, real and personal, of the Vicksburg Water Works Company, together with its contract rights under the ordinance of Nov. 18th, 1886, and was in the possession of and was operating the plant, and asked to be substituted as complainant in the case. With its bill it filed the deed of conveyance. (R. p.p. 103–4–5.)

On the 12th, day of January, 1904, the Court below, at the instance of both parties, and before the petition of the City Water Works & Light Company had been acted upon,

set down the case for final hearing on the 2nd, day of May, 1904, at Jackson, Mississippi. (R. p. 110.) Depositions were thereafter taken on both sides. From some cause not shown by the record, the case was not tried on the 2nd, day of May, 1904, the day on which it was set for trial, but on that day the City Water Works & Light Company moved that its petition to be substituted as complainant in the case be granted; and the Vicksburg Water Works Company filed its consent to that effect. (R. 111.) On May 5th, the City Water Works & Light Company filed its original bill in the nature of a supplemental bill, setting out verbatim the original bill in this case, with all of its exhibits, and averred that it had purchased the property and franchises of the Vicksburg Water Works Company, that it was in the possession of the same, and wound up by praying for appropriate relief. (R. p.p. 118–168.

On the 13th, day of May, the City Water Works & Light Company moved the Court for leave to withdraw its petition filed December 2nd, 1903, asking to be substituted as complainant, also its original bill in the nature of a supplemental bill, filed May 5th, and all exhibits to said bill, and the Vicksburg Water Works Company moved to withdraw its consent to the filing of said bill and the substitution of the City Water Works & Light Company as complainant. (R. p. 169.) The motion was granted. (R. p. 170.)

Thereupon the Vicksburg Water Works Company moved the Court to strike out cross interrogatories 135 to 144, inclusive, addressed to M. O. Crumpler, and the answers thereto, and all other questions and answers relating to the City Water Works & Light Company. (R. p. 170.)

The defendant objected to the striking out of these questions and answers, but the objection was overruled and an order made striking them out. (R. p. 179.) The defendant then asked leave to file a supplemental answer, which it presented with its motion, for the purpose of showing that the Vicksburg Water Works Company had sold all its real and personal property to the City Water Work & Light Company, and that it no longer had any interest in the

subject matter of the litigation, and that it had no right to the hydrant rentals, which it claimed, and that respondents be allowed time within which to prove these facts, but the Court overruled the motion and refused to allow the filing of the supplemental answer and time to prove its contents, and the case was heard on the pleadings already made up and the evidence, which is contained in the record, and on the final hearing the Court entered the following decree:

"FINAL DECREE.

VICKSBURG WATER WORKS COMPANY,

vs.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, MISSISSIPPI.

Equity No. 41.

This day this cause came on to be heard in accordance with the motion of complainant and defendant filed January 12, 1904, and the order of this court on the hearing of said motion rendered on the said January 12, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendants, proof and exhibits, and the court after hearing and attending the evidence and the arguments of counsel and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its original and amended and supplemental bills and for full relief; it is thereupon hereby ordered, adjudged and decreed:

First. That the defendant, The Mayor and Aldermen of the City of Vicksburg, be and is hereby perpetually enjoined from abrogating or taking away or from assuming to abrogate or take away the franchises or contract rights of complainant under and by virtue of the ordinance, franchise or contract of said defendant entitled "An Ordinance to provide for a supply of water to the City of Vicksburg in Warren County, Mississippi, and to its inhabitants," contract-

ing with Samuel R. Bullock & Company, their associates, successors and assigns for a supply of water for public use and giving the said City of Vicksburg an option to purchase the said works, ordained the 18th day of November, 1886, approved by John W. Powell, mayor, November 19, 1886, being the ordinance, contract, and franchise marked Exhibit 'B' to the original bill of complaint, and said ordinance, contract and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by and is the sole and exclusive property of said complainant.

Second. That said ordinance, contract and franchise be and is hereby declared and held to be in all and every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by complainant thereunder.

Third. That said defendant be and is hereby directed to rescind its resolution and ordinance adopted the 7th day of November, 1900, which is in words and figures as follows:

Resolved, 'That the Mayor be and is hereby instructed to notify the Vicksbnrg Water Works Company that the Mayor and Aldermen deny any liability upon any contract for the use of the water works hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as shall be necessary to determine the rights of the city in the premises.'

And also rescind the ordinance or resolution of said defendant adopted the 7th, day of February, 1901, when the said defendant adopted the report of the committee on water works as set out in the pleadings.

Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the Legislature of the State of Mississippi, approved

March 9, 1900, and from issuing bonds under and by virtue of said act or any other act, or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance, contract and franchise.

Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the period prescribed in the said ordinance, contract and franchise dated the 18th of November, 1886.

Sixth. That the said defendant be and is hereby required to pay all moneys due or owing or that may hereafter be due or owing to said complainant under and by virtue of said ordinance, contract and franchise.

Seventh. That the said defendant be and hereby is perpetually enjoined from making or adopting any resolution or ordinance refusing to pay the contract price of water fixed by said ordinance, contract and franchise, until the expiration of the period prescribed in said ordinance, contract and franchise.

Eighth. That the said defendant be and is hereby enjoined from permitting any further connections for the conveyance of sewerage or excremental matter, with the storm sewer or culvert located on Washington street, City of Vicksburg, and the defendant is hereby directed and commanded within twelve months from this date to extend said sewer or culvert and construct an outlet therefor so as to discharge said sewerage and excremental matter into the Yazoo or Mississippi river below the intake pipe of complainant, provided that if the defendant is unable to construct or extend said sewer or culvert and construct said outlet within twelve months from this date, it can apply to this court for good cause shown for an extension of time beyond the said period of twelve months.

Ninth. That said defendant pay the costs of this cause to be taxed. Ordered, adjudged and decreed this 18th day of May, 1904.

H. C. NILES,
Judge."

ASSIGNMENT OF ERRORS.

VICKSBURG WATER WORKS COMPANY,
Complainant.
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Respondent.

Now comes the respondent and files the following assignment of errors upon which it will rely:

1st. That the United States Circuit Judge erred in allowing the City Water Works & Light Company to withdraw its petition filed in said cause on December 2nd, 1903, whereby it prays to be admitted as a party complainant and also allowing the said City Water Works & Light Company to withdraw its original bill in the nature of supplemental bill filed in said cause on the —— day of May, 1904, and the said court erred in allowing the complainant to withdraw its consent to the filing of said petition and the said original bill in the nature of a supplemental bill authorizing the withdrawal of said several papers being in words and figures as follows, to-wit:

This day came on to be heard the motion of the City Water Works & Light Company to withdraw from the files its petition herein filed December 2nd, 1903, and its original bill in the nature of a supplemental bill filed the 8th day of May, 1904, with all exhibits and the motion of the Vicksburg Water Works Company to withdraw from the files its written consent to the filing of said bill, and the Court being fully advised in the premises doth hereby order, adjudge and decree that leave be granted as prayed for to withdraw said petition, bill, exhibits and written consent.

2nd. The court erred in refusing to allow respondent to file a supplemental answer setting up that the said City

Water Works & Light Company was an essential party complainant and that unless it should be made a party complainant the court could not proceed but must dismiss the bill.

3rd. The court erred in refusing to continue said cause on the motion of respondent after he had permitted the City Water Works & Light Company to withdraw its petition and its original bill in the nature of a supplemental bill whereby it sought to be named a party complainant in said cause and after it had permitted the complainant to withdraw its consent for the City Water Works & Light Company to be made a party complainant.

4th. The court erred in granting the complainant's motion to strike from the evidence interrogatories number 135–136–137–138–139–140–141–142–143–147 propounded to witness M. O. Crumpler and the answers thereto and the said interrogatories and answers being as follows, to wit:

Cross Int. 135. Mr. Crumpler what has become of the corporation heretofore existing and known as the Vicksburg Water Works Company, have you surrendered your franchise?

Ans. We have not; it has simply sold out what property it had to the City Water Works & Light Company.

Cross Int. 136. It has no property of any kind whatever?

Ans. No sir.

Cross Int. 137. What business is it now engaged in carrying on?

Nothing.

Cross Int. 138. How long since it has been engaged in carrying on business or owned any property?

Ans. First of December, 1903.

Cross Int. 139. What corporate act or acts, if any, has it done since the 1st of December, 1903?

Ans. I don't know of any except in winding up its business?

Cross Int. 140. If it has no property and is carrying on no business what further business has it to wind up?

Ans. It is winding up the accounts that belong to the company.

Cross Int. 141. It does then, as a matter of fact, still own some accounts and claims against people?

Ans. Yes, sir.

Cross Int. 142. Then when you said that it had no property you meant that it had no tangible property. I mean that it had no water works or anything of that kind.

Ans. Yes, sir.

Cross. Int. 147. You are the manager of the new company, the City Water Works & Light Company, the same as you were the manager of the old company; The Vicksburg Water Works Company, are you not?

Ans. Yes, sir.

5th. The said court erred in rendering final decree against respondent because said decree is contrary to the law and the facts as stated in the pleadings and proof before said court.

6th. Said court erred in perpetuating by its final decree the injunction against respondent restraining it from building a water works plant of its own.

7th. The court erred in granting a mandatory injunction against respondent commanding respondent within one year to build and construct a sewer whereby the sewer now existing on Washington Street in the City of Vicksburg should be extended and made to discharge at some point on the Mississippi River south of the intake pipe of complainant.

In order that the foregoing assignment of errors may appear of record respondent presents the same to the court and prays that such disposition be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided, and that upon hearing the said final decree may be reversed and said cause remanded, all of which is respectfully submitted.

.....

Solicitors for respondent.

II. ARGUMENT.

Complainant's motion to dismiss is coupled with a motion to affirm the decree of the Court below. The motion to dismiss is based upon three grounds, namely; (1) Failure of counsel for the appellant to sign the assignment of errors. (2) Failure of the Clerk to certify and send up with the record Exhibit B to the deposition of M. O. Crumpler. (3) Want of jurisdiction on the part of this Court to hear and determine the matters of law and fact involved.

The motion to affirm is based upon the ground that the appeal is frivolous and was taken for delay only.

ON MOTION TO DISMISS.

1. The failure of counsel for the appellant to sign their names to the assignment of errors was irregular, of course, but not such an irregularity as to defeat the ends of justice. We have read the Supreme Court rules on this subject and we do not find a rule that requires the attorneys to sign the assignment of errors with their names, and no penalty is fixed for failing to do so. In one sense it may be said that the assignment of errors is signed, because it is signed "Solicitors for respondent." There is no trouble to look back over the record and see who were the solicitors for the respondent. Moreover, the petition for appeal and the assignment of errors were duly filed in the case in the court below, were submitted to the judge and approved by him in their then form, and the appeal duly allowed by order entered of record in the case.

The failure to sign the assignment of errors was a mere inadvertance on the part of counsel, and we have filed a motion to be allowed to sign the assignment of errors *nunc pro tunc*, and that will correct any defect which there is in this assignment of errors.

2. Failure of the Clerk to certify and send up as a part of the record Exhibit B to the deposition of M. O. Crumpler

was not the fault of the Appellant, and their appeal should not be dismissed for that reason, but they should be allowed to supply the record. We have filed a suggestion of diminution and have asked to have this Exhibit copied and sent up. Coupled with the suggestion of diminution is an affidavit to the effect that the map has now been found and can be certified to this Court, and will be if we are permitted to have it done. We are informed by counsel in their brief that this map shows the different streets leading into Washington Street, in which sewers have been laid which lead into the storm sewer on Washington Street. We are willing to concede that the map shows exactly what counsel says it shows, and that, it occurs to us, ought to be satisfactory to them, if it is justice they are after and not a mere technical advantage. Moreover, the testimony of M. O. Crumpler shows exactly in what streets sewers have been laid leading into the storm sewer on Washington Street. In other words, the record shows otherwise than by the exhibit itself all that the exhibit would prove were it properly copied into the record. This ought to be sufficient, but if the Court thinks it is not then we ask that our motion to supply it be granted.

3. Want of Jurisdiction. Counsel for the appellee next contend that this Court is without jurisdiction to hear this appeal, for the reason that the law and the facts do not bring the case under the act of March 3rd, 1891, providing for appeals direct to this Court.

In support of their contention counsel for appellee rely mainly upon the decision of this court on the former appeal, reported in 185 United States, page 65, *et seq.*, wherein the question of the jurisdiction of the Federal Court was presented and decided; and they contend that the decision of this court in that case is decisive of this appeal. We do not so understand it.

Our view of the decision in that case is that it is authoritative only on the question as to whether or not the bill in that case presented a Federal question. The Court in its opinion starts out by saying:

"The sole question for our consideration is whether the "bill as originally filed and as amended, presented a Fed- "eral question. As the party plaintiff and the party de- "fendant were both corporations and citizens of the same "state, the Circuit Court of the United States could not "take jurisdiction of a controversy between them unless "the complainant laid grounds for that jurisdiction by "asserting rights arising under the constitution or laws of "the United States, and such assertion must appear in the "complainant's statement of its own claim."

In other words, the Court was then considering whether on the complainant's own showing (without reference to the answer on file or the evidence which might be thereafter adduced on the hearing) complainant had made a case cognizable by the Federal Court. With reference to the act of March 9th, 1900, this Court, in its opinion. says:

"Whether this act of the Legislature is, in its terms, "subject to these objections" (that is, that it was unconsti- "tutional, for reasons named in the bill) "or whether it "may be regarded as merely authorizing the city to pro- "ceed in such a manner as to not conflict with the existing "contract obligations, we need not determine at this stage "of the case."

Certainly this question was also left open for the decision of the proper tribunal.

Referring to the objections urged in the brief of the appellee to the validity of the contract because it undertakes to bind the city for a period of thirty years, because an attempt to barter away the legislative power of the city authorities and because creating an indebtedness in excess of the charter powers, this Court says:

"We do not wish to be understood as now deciding "such questions in the present case, for we are only con- "sidering whether or not the Circuit Court had jurisdiction "to consider them."

Again the Court says:

"Nor can we consider allegations made in behalf of the "city in its answer as to misconduct of the water works

" company, in respect to which no issue was found nor
" proofs taken in the court below. They must be deter-
" mined by the proper tribunals, which will pass upon the
" merits of the case."

It is clear, from these excerpts from the opinion of the court, as well as from the opinion itself, that the sole question decided or intended to be decided by this court in that case was the question of jurisdiction, and that the entire merits of the controversy were expressly left open by the court for future examination and decision.

Counsel next contend that where the decree on the second appeal is strictly in accordance with the mandate of the Supreme Court rendered on the first appeal, that the second appeal will not lie, and in proof of this proposition they have cited numerous authorities. We concede the corretness of the principle, but contend that it has no application whatever here. The principle applies, and applies only, where a case has been disposed of by this Court on its merits, and this Court has settled all the principles of law and all the questions of fact involved, and has remanded the case with instructions for a decree to be entered in accordance with its opinion. Of course, in a case like that the Court below has nothing to do but to give effect to the decision of the Supreme Court, and an appeal from a decree of the court below in such a case would really be an appeal from the decision of the Supreme Court itself. Of course, no such appeal ought to be allowed.

They next contend that upon an appeal from proceedings under a mandate directed to the lower court nothing is before the court but the proceedings subsequent to the mandate on the first appeal, and in support of this proposition they have cited numerous authorities taken from Rose's Digest, p.p. 213–214. We recognize the correctness of this proposition also, but insist that it has no application here, because we are not asking the court to consider or decide any question of law or fact which was considered and decided in the first case, and have not brought this appeal here for the purpose

riticising the opinion of this court on the former appeal. We are, therefore, to ascertain the questions of law and arising upon the face of this record upon the merits of ase subject to the filing of the mandate in the court be- and then to determine whether these questions of law fact, or any of them, justify an appeal by us direct to this court.

The propositions of law and fact arising on the face of the record, the final decree and the assignment of errors are briefly stated as follows:

1. The franchise and contract evidenced by the ordinance of Nov. 18th, 1886, with Samuel R. Bullock & Co. is illegal and invalid and not binding upon the appellant, because the ordinance evidencing said contract was not adopted in accordance with the provisions of the charter of the City of Vicksburg.

2. The contract, if validly enacted, was forfeited by the appellees and their immediate vendor, the Vicksburg Water Supply Company, because of their failure to furnish to the city and its inhabitants an adequate supply of good and wholesome water for public and private use, and because of their failure to keep the pressure on the mains sufficiently high to protect the inhabitants of the city of Vicksburg against injuries from fires.

3. The contract, if validly enacted, was personal to Samuel R. Bullock & Company and their vendee, the Vicksburg Water Supply Company, and was not assignable, and did not pass to the appellee by virtue of its purchase under the deed of trust to the Farmers Loan & Trust Company and the quit-claim deed of the Vicksburg Water Supply Company; and the appellee has not shown any right or power in itself to acquire and hold such contract.

4. If the contract did pass by virtue of the conveyances named, to the appellee, it passed subject to the sovereign right of the state to fix and regulate the rates which it should charge both to the city and its inhabitants for water furnished by it and consumed by them.

5. The appellee having been incorporated and organized under the constitution and laws of the State of Mississippi, has no power to take and hold a contract that is not subject to regulation by the State of Mississippi.

6. The appellant had the right, both under the amendment to its charter in 1886 and the act of March 9th, 1900, to construct and operate a water works of its own, but it had no power to contract with another to preclude itself from so doing, and did not, by the ordinance of Nov. 18th, 1886, preclude itself, and the court below erred in enjoining it from building and operating a water works of its own for that reason.

7. The court below erred in granting the mandatory injunction against respondent commanding it, within one year, to build and construct a sewer, whereby the sewer now existing on Washington Street in the City of Vicksburg should be extended and made to discharge at some point on the Mississippi River south of the intake pipe of the complainant.

8. On the pleadings. The court below erred: (1) in allowing the City Water Works & Light Company to withdraw its original bill in the nature of a supplemental bill; (2) in refusing to allow the defendant to file its supplemental answer, setting up the fact that the complainant had sold out its plant and was no longer interested in the subject matter of the litigation; (3) in striking out cross interrogatories 135 to 147, inclusive, to M. O. Crumpler, and his answers thereto, showing the sale of said property by the appellee to the City Water Works & Light Company; (4) in proceeding to final judgment and decree without making the City Water Works & Light Company a party to the proceeding, as prayed for in the supplemental answer.

The act of March 3rd, 1891, relating to appeals to this Court, provides that an appeal may be taken direct to this Court from a Circuit Court in the following cases: (Numerals ours)

of criticising the opinion of this court on the former appeal.

We are, therefore, to ascertain the questions of law and fact arising upon the face of this record upon the merits of the case ~~subject~~ subsequent to the filing of the mandate in the court below, and then to determine whether these questions of law and fact, or any of them, justify an appeal by us direct to this court.

The propositions of law and fact arising on the face of the record, the final decree and the assignment of errors are briefly stated as follows:

1. The franchise and contract evidenced by the ordinance of Nov. 18th, 1886, with Samuel R. Bullock & Co. is illegal and invalid and not binding upon the appellant, because the ordinance evidencing said contract was not adopted in accordance with the provisions of the charter of the City of Vicksburg.

2. The contract, if validly enacted, was forfeited by the appellees and their immediate vendor, the Vicksburg Water Supply Company, because of their failure to furnish to the city and its inhabitants an adequate supply of good and wholesome water for public and private use, and because of their failure to keep the pressure on the mains sufficiently high to protect the inhabitants of the city of Vicksburg against injuries from fires.

3. The contract, if validly enacted, was personal to Samuel R. Bullock & Company and their vendee, the Vicksburg Water Supply Company, and was not assignable, and did not pass to the appellee by virtue of its purchase under the deed of trust to the Farmers Loan & Trust Company and the quit-claim deed of the Vicksburg Water Supply Company; and the appellee has not shown any right or power in itself to acquire and hold such contract.

4. If the contract did pass by virtue of the conveyances named, to the appellee, it passed subject to the sovereign right of the state to fix and regulate the rates which it should charge both to the city and its inhabitants for water furnished by it and consumed by them.

5. The appellee having been incorporated and organized under the constitution and laws of the State of Mississippi, has no power to take and hold a contract that is not subject to regulation by the State of Mississippi.

6. The appellant had the right, both under the amendment to its charter in 1886 and the act of March 9th, 1900, to construct and operate a water works of its own, but it had no power to contract with another to preclude itself from so doing, and did not, by the ordinance of Nov. 18th, 1886, preclude itself, and the court below erred in enjoining it from building and operating a water works of its own for that reason

7. The court below erred in granting the mandatory injunction against respondent commanding it, within one year, to build and construct a sewer, whereby the sewer now existing on Washington Street in the City of Vicksburg should be extended and made to discharge at some point on the Mississippi River south of the intake pipe of the complainant.

8. On the pleadings. The court below erred: (1) in allowing the City Water Works & Light Company to withdraw its original bill in the nature of a supplemental bill; (2) in refusing to allow the defendant to file its supplemental answer, setting up the fact that the complainant had sold out its plant and was no longer interested in the subject matter of the litigation; (3) in striking out cross interrogatories 135 to 147, inclusive, to M. O. Crumpler, and his answers thereto, showing the sale of said property by the appellee to the City Water Works & Light Company; (4) in proceeding to final judgment and decree without making the City Water Works & Light Company a party to the proceeding, as prayed for in the supplemental answer.

The act of March 3rd, 1891, relating to appeals to this Court, provides that an appeal may be taken direct to this Court from a Circuit Court in the following cases: (Numerals ours)

(1) In any case that invokes the construction or application of the constitution of the United States.

(2) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

By comparing the propositions of law and fact arising on the record in this case with these provisions of the statute, our right to appeal direct to this Court is clear.

The first ground relates to the validity of the ordinance of November 18th, 1886.

The second to its forfeiture by appellees because of their failure to comply with its terms and conditions.

The third to the power of the Vicksburg Water Supply Company to assign the contract to the appellee.

The fourth to the sovereign power and right of the state to regulate its corporations in the exercise of the powers granted them.

The fifth to the power of the appellee corporation to take and hold a contract or franchise not subject to regulation by the State.

The sixth to the right and power of the municipality of Vicksburg to preclude itself from building a water works system under the amendment to its charter made in 1886; and whether it did so preclude itself by the ordinance of November 18th, 1886.

The seventh to the power of the Court to direct a municipality in the exercise of its governmental functions.

The eighth relates solely to the pleadings.

As we understand the law, if any one of these questions invokes the construction or application of the constitution of the United States, or raises a question as to the constitutionality of the law of March 9th, 1900, then this Court has jurisdiction, not only to determine that question, but to determine every other question which is presented by the record.

In our opinion several of these propositions do directly invoke the construction or application of the constitution

of the United States, or raise a question as to the constitutionality of the act of March 9th, 1900, of the Legislature of the State of Mississippi, hereinbefore referred to.

In Penn. Mutual Life Ins. Co. vs. Austin (1898) 168 U. S., p. 685, this Court held:

"That a direct appeal lies to the Supreme Court of the "United States from a decree of a Circuit Court sustaining "a demurrer and dismissing a bill which in express terms "predicate complainant's right to the relief sought upon "the averment that certain city ordinances and certain "state laws impaired the obligations of the contract."

That is exactly what the bill in this case did.

In Loeb vs. Columbia Tp., 179 U. S., 472, this Court again declared:

"If the claim is made in the Circuit Court, no matter "by which party, that a state enactment is invalid under "the constitution of the United States, and that claim is "sustained or rejected, this Court will review the judgment "at the instance of the unsuccessful party, whether plaintiff or defendant."

In the case of Connelly vs. Union Sewer Pipe Co., 184 U. S. p. 544, this Court again held that it

"Has jurisdiction to review a decree of the Circuit "Court in all cases in which a question as to the constitu-"tionality of a state statute is decided against the claim of "either party."

In its original bill (R. p. 8) the complainant sets up the act of March 9th, 1900, and charges that said act is unconstitutional for many reasons, and among others, asserts that it is an ex post facto law and impairs the obligations of complainant's contract. The *gravamen* of its complaint was that this act was unconstitutional and void. Moreover, the Court in the decree which it rendered, although it does not say so in express terms, was bound nevertheless to have declared that act of the Legislature unconstitutional upon the

ground that it impaired the obligation of complainant's contract. Not only, therefore, was there a contention raised as to the constitutionality of that law and as to the constitutionality of the proceedings of the Board of Mayor and Aldermen thereunder and otherwise, but that contention was sustained by the Court below. It follows, therefore, that the appeal was properly taken to this Court, and the motion to dismiss for want of jurisdiction ought to be overruled.

Before the Court can decide that the contract of November 18th, 1886, had been, or was about to be, impaired, because of the acts and conduct of the appellant complained of in the bill (which is a constitutional question) it must decide.

1. That there was a contract in existence to be impaired.

2. That the contract was exclusive as against the appellant.

3. That the appellee is the owner of that contract and has the right to enforce it.

1. In deciding the first point the Court must incidentally decide; (1) that the contract of Nov. 18, 1886, was legally adopted and entered into by the appellant; (2) that it has not been forfeited by reason of the failure of the appellee and its predecessor to comply with its terms.

2. In deciding the second question it must incidentally decide; (1) whether the city had athority to make a contract to exclude itself; (2) whether it, by this contract, did exclude itself; (3) to what extent it excluded itself.

3. In deciding the third point it must incidentally decide; (1) whether the Vicksburg Water Supply Company had the power and right to assign the contract; (2) whether the appellee had the right and power to purchase it; (3) whether it has the right and power to own and exercise the exclusive right under the Constitution and laws of Mississippi.

So we see that every proposition of law and fact raised, except the 7th and 8th, is directly or indirectly involved in this decision, and these will be discussed, in part, on the motion to affirm.

ON THE MOTION TO AFFIRM.

In their argument on the motion to affirm the decree of the court below, counsel for appellee have necessarily gone somewhat into an argument of the case on its merits, and we will follow them sufficiently far, we hope, to show that this appeal is not frivolous and was not brought for delay only, as contended for by them.

1. ON THE INVALIDITY OF THE CONTRACT.

If the ordinance of November 18th, 1886, was adopted in violation of the provisions of the city charter of the City of Vicksburg, it is void. Section 25 of the city charter reads as follows:

"Be it further enacted that the Board of Mayor and "Aldermen shall not make any contract involving the ex- "penditure of corporation funds relating to work on public "streets or the erection, extension or repair of public build- "ings, where the cost of the proposed work shall exceed "$500.00, or for materials to be furnished exceeding $200.00 "in value, except in the following manner: Upon the di- "rection of the Board, the Mayor shall advertise for sealed "proposals to do the contemplated work for ten days in a "newspaper published in the City. At the first meeting of "the Board after such publication the Mayor shall open "and lay before the Board all proposals received by him "and the Board shall accept the lowest and best bids or "they may reject all bids made and direct publication to be "made for other proposals." Law of Miss., 1884, 435.

The bill in this case does not even allege that the contract was adopted in pursuance of any advertisement. It does allege, however, that the contract was let upon competitive bids. The answer denies that allegation and puts upon the appellee the burden of proving it. No proof was offered showing that the contract had been let in pursuance of the advertisement, as provided for by Sec. 25 of appellants charter, and as the contract related to work on the public streets and the cost of the proposed work exceeded $500.00, the ordinance was adopted in violation of the city charter,

and is, therefore, void. Van Ripen vs. Jersey City, N. J. L., 262, is precisely in point.

2. ON FORFEITURE OF THE CONTRACT.

By the ordinance of November 18th, 1886, the Water Works Company agreed:

"To furnish an adequate supply of good and wholesome "water to the City of Vicksburg, Mississippi, and to its in- "habitants, for public and private use." (R. p. 15, Sec. 1.)

"The water shall be taken from such point as may be "free from all sewerage contamination, and shall be good, "wholesome water, fit for all purposes of domestic con- "sumption." (R. p. 17, par. 2.)

"But the city shall not be liable to pay the rental for "any fire hydrant during such time as a proper supply of "water cannot be procured therefrom," etc, etc. (R. p. 20, par. 1.)

The appellant's contention is and has been all the while, that the Vicksburg Water Supply Company and its successor, the appellee, the Vicksburg Water Works Company, failed to comply with the foregoing provisions of the contract; that the water furnished by these companies was frequently inadequate to protect the city and its inhabitants from fire; that the water furnished was muddy and not free from sewerage contamination, and was not good wholesome water, fit for all purposes of domestic consumption, and for these reasons the contract has been forfeited.

In support of these contentions we refer the court to the testimony of the following witnesses, namely:

W. L. Trowbridge, Mayor, R. p. 305.
J. J. Hayes, Alderman, R. p. 330.
D. A. Campbell, Alderman, R. p. 336.
Chas. Schuler, Asst. Chief Fire Dept., R. p. 344.
W. O. Smith, Alderman, R. p. 350.
D. Montgomery, Alderman, R. p. 356.

3. ON THE NON-ASSIGNABILITY OF THE CONTRACT.

If this contract was personal with Samuel R. Bullock & Company and its vendee, the Vicksburg Water Supply

Company, then the Vicksburg Water Supply Company had no right or power to assign it to the appellee, and appellee's effort to acquire the title to the contract by purchase under the deed of trust to the Farmers Loan & Trust Company, trustee, and under the quit-claim deed of the Vicksburg Water Supply Company hereinbefore referred to, was nugatory.

By Sec. 5 of the ordinance of Nov. 18th, 1886, Samuel R. Bullock & Company were authorized to procure the organization of a water works corporation under the laws of Mississippi, and were authorized to assign to it all the rights and privileges acquired under the ordinance, but the appellants never agreed that any other or further assignment of such rights and privileges should be made to any one.

On March 1st, 1887, Samuel R. Bullock & Co. assigned and transferred, under and by virtue of this 5th section of the aforesaid ordinance, all their rights and privileges under the ordinance to the Vicksburg Water Supply Company, which had been incorporated under the laws of Mississippi for the purpose of taking over the contract and building a water works and operating the same. This assignment was in accordance with the contract, but there never has been any other transfer or assignment made which was acceptable to the appellants and which was approved by them, and, as said before, they have consistently and persistently refused to recognize the pretended transfer to the Vicksburg Water Works Company, and refused to treat with it as the owner of the ordinance of Nov. 18th, 1886, or as entitled to any rights whatever thereunder.

That this contract was personal and not assignable and that the Vicksburg Water Supply Company was without power or right to assign the contract to the Vicksburg Water Works Company and to compel the appellants to look to them for its performance, and that appellants would be bound thereby without their consent, is, we believe, conclusively established by the following authorities:

Matthews vs. Board of Corp. Comm. (1897) 97 Fed. Rep., 400.

Geo. W. Thomas, et al vs. W. Jersey R. R. 101 U. S., 71.

Gibbs vs. Consolidated Gas Co. of Baltimore City, 130 U. S., 396.

St. Louis R. R. Co. vs. Gill, 156 U. S., 649.

Norfolk vs. Pendleton, 166 U. S. 667.

Adams vs. Y. & M. V. R. R. Co., 180 U. S. I.

Brunswick Gas Lt. Co., vs. United Gas Co., 85 Me., 535.

Commonwealth vs. Smith (Mass.) 87 Am. Dec. 672.

Chicago Gas Lt. Co. vs. Peoples Gas Co., 2 Am. St. Rep. 124.

Nor has the appellee shown any right or power to acquire and own this ordinance contract and franchise. The burden was certainly upon the appellee to show, in addition to the mere fact of its incorporation which is admitted, when it was incorporated; that it was authorized to supply the City of Vicksburg and its inhabitants with water; that it was authorized to own and operate a water works for that purpose; and that it was authorized to acquire and own the contract and franchise granted by appellants to Samuel R. Bullock & Co., together with all their rights and privileges thereunder, and these facts it did not prove.

The only way it might lawfully prove them was by the production of its charter; but the appellee, while it filled all manner of exhibits with its original and amended bill, for some cause best known to itself, failed to file its charter the evidence of its existence, and the measure of its powers, either as an exhibit to its pleadings or as a part of its evidence.

If there was any allegation in the bill, or proof in the files covering these fatal omissions, it would not be competent for that purpose, but there is none. So that the court is absolutely without any evidence competent or otherwise as to when the Appellee Company was chartered and organized; the objects and purposes for which it was created, and the powers with which it was endowed.

Having failed to show any right or power in itself to acquire and own the contract and franchise of Nov. 18th, 1886, the suit, being based upon that right must fail.

4. THE RIGHT TO REGULATE RATES.

But if mistaken in the foregoing views, and the contract was assignable and did pass to the Vicksburg Water Works Company without the consent or approval of the appellants, then we contend that it passed subject to the sovereign right and power of the State of Mississippi to fix and regulate rates to be charged to the city and to the individual consumers of water whenever it chose to do so, and the fixing and regulating of such rates would not impair complainant's contract. In Stone vs. The Farmers Loan & Trust Company, 116 U. S., 636, this court, speaking with reference to the power of the State to regulate its corporations, said:

> " The power to regulate is a power of government, con-
> " tinuing in its nature, and if it can be bargained away at
> " all it can only be by words of positive grant, or something
> " which is in law equivalent, and if there is reasonable doubt
> " it must be resolved in favor of the existance of the power."

In the case of Providence Bank vs. Billings, 14 Peters, 514, this court, speaking through Chief Justice Marshall, says:

> " This abandonment ought not to be presumed in a case
> " in which the deliberate purpose of State to abandon it does
> " not appear. This rule is elementary and the cases in our
> " reports where it has been considered and applied are nu-
> " merous."

Of course, the State could, if it desired to do so, abandon its governmental right and deprive itself of the power to regulate its corporations, but it must be done by apt words about whose meaning there can be no doubt; and we insist that the legislative grant by the State to the city of Vicksburg "to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with a party or parties to build and operate a water works," does not evidence any desire or purpose on the part of the State of Mississippi to deprive itself of the power to fix and regulate rates to be charged by the

party or parties to whom the contract should be let to build and operate a water works. This contention is, we believe, sustained by the following authorities:

Collins vs. Sherman, 31 Miss., 679.
Vol. 9 Rose's Notes, 29. (Mun. vs. Ill., 94 U. S., 114.)
R. R. Co. vs. Stone, 116 U. S., 307–347.
Norfolk vs. Pendleton, 156 U. S. 667.
San Diego vs. National City, 174 U. S.. 739.
Owensboro vs. Owensboro W. W. Co., 191 U. S., 358.
Rogers Park Water Co. vs. Fergus (1901) 180 U. S., 624.
Stanislaus County vs. San Joaquin C. & I. Co., 192 U. S., 201.
Rushville vs. Rushville, 15 L. R. A., 321 and note, 322.
Knoxville W. W. Co. vs. Knoxville, 189 U. S., 434.

5. ON THE POWER OF COMPLAINANT TO HOLD A CONTRACT NOT SUBJECT TO LEGISLATION BY THE STATE.

By Section 178, Article 7, of the Constitution of Mississippi, adopted November 1st, 1890, it was provided as follows:

"Corporations shall be formed under general laws only. "The Legislature shall have power to alter, amend or re- "peal any charter of incorporation now existing and revoc- "able and any that may hereafter be created, whenever in "its opinion it may be for the public interest to do so; pro- "vided, however that no injustice shall be done to the stock- "holders."

The Legislature of the State of Mississippi, pursuant to this constitutional requirement, did provide by general laws for the incorporation of private corporations. Revised Code of Mississippi, 1892, Chapter 25.

On March 9th, 1900, the Legislature of the State of Mississippi authorized the City of Vicksburg to build or buy a water works and sewerage system and to issue bonds for that purpose. The material parts of this act will be found copied in the preceding pages of this brief to which reference is made. On March 19th, 1904, about two months prior to

the final decree in this case, the Legislature of the State of Mississippi passed another act, the material parts of which are as follows:

"SECTION 1. *Be it enacted by the Legislature of the State* " *of Mississippi*, That the corporate authorities of any city, " town or village now or hereafter incorporated under any " general or special laws of this state, in which any individ- " ual, company or corporation has been or hereafter may be " authorized by said city, town or village to supply water, " electric light or gas to said city, town or village, or the in- " habitants thereof, be and they are hereby empowered to " prescribe by ordinance maximum rates and charges for " the supply of water, electric light or gas furnished by such " individual, company or corporation to such city, town or " village or the inhabitants thereof, such rates and charges " to be just and reasonable. And in case the corporate au- " thorities or any such city, town or village shall fix unjust " and unreasonable rates and charges the same may be re- " viewed and determined by the Circuit Court of the County " in which said city, town or village may be; provided, that " this act shall not be construed so as to impose [impair] " the effect or obligation of any valid or binding contract " with any water works company, electric light company or " gas company now existing or heretofore made with any " individual, or water company, electric light or gas com- " pany." Laws of Mississippi, 1904, 231.

If the appellee corporation came into existence under the Constitution of 1890 and the municipal chapter of the State of Mississippi enacted in 1892, it can exercise no powers and no rights which are prohibited by the constitution and laws of Mississippi. Moreover its charter was and is subject to alteration, repeal or amendment, and has been amended by the act of 1904 above quoted. It cannot complain of any of these laws ~~because it knew they~~ which were in existence when it accepted its charter. Its rights and privileges are fixed by these laws and the decree of the Court which held, in effect, that they were not, is erroneous, as will be abundantly shown, we, think, by the subjoined authorities:

Hamilton Gas Lt. Co. vs. Hamilton, 146 U. S., 258.
Norfolk vs. Pendleton, 156 U. S., 667.

Griffin vs. Goldsboro, N. C. 41 L. R. A., 240.
Redland vs. Redland, 121 Cal., 365.
Matthews vs. Bd. of Corp. Comm., 97 Fed. Rep., 400.
Greenwood vs. Union Frt. Co., 105 U. S., 13.
Newburyport W. W. Co. vs. Newburyport, 193 U. S., 562.
Rogers Park Water Co. vs. Fergus, 180, U. S., 702.
County of Stanislaus vs. San Joaquin C. & I Co., 192 U. S., 202.
Winchester & Lexington Turnpike Rd., vs. Croxton, 33 L. R. A., 177.
Y. & M.V. R. R. Co., vs. Adams, 180 U. S., p. 1 & p. 26.
Walla Walla Water Co., vs. Walla Walla, 172 U. S., 1.

If it came into existence prior to the constitution of Miss., 1890, it should have pleaded and proven that fact.

6. ON THE EXCLUSIVE FEATURE OF THE CONTRACT.

The Court below erred in holding that the appellee had the sole and exclusive right to build and operate water works in the City of Vicksburg and in enjoining the City of Vicksburg from building a water works of its own and from issuing bonds for that purpose under the act of March 9th, 1900. The City of Vicksburg was empowered, under the amendment to its charter of 1886 and also under the act of March 9th, 1900, to buy or build and operate a water works of its own if it saw fit to do so, and it has that power now, unless:

1. It was authorized by the aforesaid amendment to preclude itself by contract from constructing and operating water works:

2. It did, by the ordinance of November 18th, 1886, so preclude itself.

3. The appellee company has the right to acquire and hold the exclusive right to operate a water works in the City of Vicksburg.

We deny each and every one of said propositions.

(1.) Whether the appellants are authorized by the amendment of 1886 to preclude themselves depends upon the

proper construction of the words fixing the power. It is expressed in these words:

"To provide for the erection and maintenance of a sys-
" tem of water works to supply said city with water, and
" to that end to contract with a party or parties who shall
" build and operate water works."

Unless it was plainly the intention of the State to authorize the city to make an exclusive grant, and unless that intent has been plainly expressed in the amendment of Nov. 18th, 1886, quoted above, the city had no power to make an exclusive grant. We insist that no such purpose was intended or expressed, and in support of our contention we cite the following authorities, which we think are conclusive of that view:

Freeport W. W. Co. vs. Freeport, 180 U. S., 587.
Saginaw Gas Lt. Co. vs. Saginaw, 28 Fed. Rep. ——
Wright vs. Nagle, 11th Otto, 791.
Greenville W. W. Co. vs. Greenville, 7 So. Rep. 409.
Collins vs. Sherman, 31 Miss., 679.
Gains vs. Coats, 51 Miss., 335.
Detroit Citizens St. Ry. Co. vs. Detroit Ry., 171 U. S., 48.
City of Brenham vs. Brenham W. W. Co., 67 Texas, 542.
Knoxville W. W. Co. vs. Knoxville, 189 U. S., 434.
Helena W. W Co. vs. Helena, 195 U. S. 383.
Long vs. Duluth, 49 Minn., 290.
Hamilton Gas Lt. Co. vs. Hamilton, 146 U. S., 258.
Skaneateles W. W. Co. vs. Skaneateles, 184 U. S., 354.
Smith vs. Town of Westerly, 35 Atl. Rep., 526.
Rogers Park W. W. Co. vs. Fergus, 180 U. S., 624.
Walla Walla Water Co. vs. Walla Walla, 172 U. S., 1.

(2) Whether or not the City of Vicksburg made a contract precluding itself from building a water works and operating the same must be determined by the language of the grant itself. The language of the grant is as follows:

" That in consideration of the public benefit to be de-
" rived therefrom the exclusive right and privilege is

" hereby granted for the period of thirty years from the " time this contract takes effect, etc.

The words "exclusive right and privilege" were intended to apply to all third parties, as against whom the exclusive right and privilege was granted to construct and operate a water works. It is true the city could not by its contract exclude all third parties, because such a contract would have been a monopoly and would have been void for that reason, but it is possible that the contracting parties did not ~~then~~ know the law in that regard. These words were never intended to be applied to the City of Vicksburg. If it had been the purpose of the parties to the contract to exclude the city from building and operating a water works of its own, apt words would have been used as was done in the case of Walla Walla W. W. Co. vs. Walla Walla, 172 U. S., 1. In that case the city of Walla Walla expressly contracted that it would not construct and operate a water works, etc., etc. In construing this language all doubts must be resolved in favor of the appellant and against the company; and so construed it does not preclude the city from constructing and operating a water works of its own.

S. W. Mo. Lt. Co. vs. Joplin, 191 U. S., 150.
Bienville W. W. Co. vs. Mobile, 175 U. S., 109.
Bienville W. W. Co. vs. Mobile, 186 U. S., 212.
Freeport W. W. Co. vs. Freeport, 180 U. S., 587.

Again, if it should be held that the city had the power, under the act of 1886, to preclude itself, and that it did preclude itself by the ordidance of November 18th, 1886, then it must be held to have precluded itself only to the extent fixed by the contract, which was to rent from Samuel R. Bullock & Co. 90 hydrants at an annual rental of $65.00 each. This was the full extent to which it was bound to take water from the appellee. It may be that the city needs a great many more than 90 fire hydrants. It may be that it will need ten times that number within thirty years from the date of the contract. It may be that it needs water for its public buildings, etc., etc. It may be that it will need water to flush its sewers which it is authorized to build under the

act of March 9th, 1900. It may be that it will need water for its public fountains. Certainly the city is under no obligations to take water from the Vicksburg Water Works Company, for any of said purposes, or for any other purposes, and if it is not, it certainly has the right to construct its own water works for the purpose of supplying its needs in excess of the ninety hydrants and the court below erred in enjoining it from building a water works of its own and from availing itself of the benefits of the act of March 9th, 1900, authorizing it to issue bonds for that purpose.

(3) But if it should be held that the city was authorized by the amendment to the city charter to preclude itself, and that it did preclude itself by the contract of Nov. 18th, 1886, then we say that the appellee water company cannot avail itself of the exclusive feature of the contract, for several reasons. The appellee having failed to file its charter, showing its powers, we have no evidence whatever that it has the power to own and to exercise the exclusive right to operate a water works in the City of Vicksburg; in fact, we have no evidence that it has the power to own and operate a water works at all.

As said before, we have no evidence as to exactly when the appellee came into existence. If it came into existence after the Constitution of Mississippi of 1890, and after the act of March 9th, 1900, authorizing the City of Vicksburg to construct and operate a water works of its own, then it cannot be heard to say that it has the exclusive right as against the City of Vicksburg to operate a water works in the City of Vicksburg. If it came into existence prior to the Constitution and act of March 9th, 1900, then it was its duty to plead and prove that fact, and failing to do so it has failed to establish any exclusive right in itself to operate a water works in the City of Vicksburg. But it may be argued that the Vicksburg Water Supply Company had the exclusive right as against the City of Vicksburg, to build and operate a water works in the city and the appellee corporation purchased that right. Our answer is that this creature of the State could not exercise a power expressly forbidden by the

constitution and laws of the State unless it was in existence and had acquired these rights prior to the enactment of the constitution and laws referred to, and that fact is not shown by the ~~evidence~~ record. If, being incorporated after the enactment of the constitution and laws aforesaid, it can buy and exercise the exclusive right to operate a water works system in the City of Vicksburg, then indeed is the creature greater than the creator.

7 EXTENSION OF THE WASHINGTON STREET SEWER.

The eighth paragraph of the final decree of the Court reads as follows:

"That the said defendant be and is hereby enjoined "from permitting any further connections for the convey- "ance of sewerage or excremental matter, with the storm "sewer or culvert located on Washington street, City of "Vicksburg; and the defendant is hereby directed and com- "manded within twelve months from this date to extend "said sewer or culvert and construct an outlet therefor so "as to discharge said sewerage or excremental matter into "the Yazoo or Mississippi River below the intake pipe of "complainant.

As to that part of the decree which enjoins the appellant from permitting further connections for the conveyance of sewerage or excremental matter with the storm sewer on Washington Street we make no objection, for the reason that the continuance of the practice might contaminate the appellee's water supply and operate injuriously to the public health. But to that part of the decree which directs and commands the appellant to extend this sewer so as to cause it to discharge the sewerage or excremental matter into the Yazoo or Mississippi River below the intake pipe of the defendant, we do object, and think we are safe in saying that this part of the decree has no precedent in the annals of the reported cases.

Counsel for the appellee have devoted thirty pages of the ninety-four page brief in this case to this paragraph of the decree in an effort to uphold it. To follow them through-

out such a lengthy argument would be without pleasure to us and without profit to the court. We content ourselves, therefor, with reference to their argument, by saying that a principle of law which requires 30 pages of printed argument to uphold it is of doubttul validity at best; that no aggregation of words can make that white which is black, and no amount of argument can convert error into truth.

Whatever may be said as to the other paragraphs of the final decree the one just quoted is certainly erroneous in the particulars named. In the first place, the pleadings and the evidence do not warrant such a decree, and in the second place the court had no power to make it.

(1) There was no allegation in the bill that the proposed extension was feasible or possible, or that it ought to be made; nor was there any prayer in the bill that such extension should be made; nor was there any evidence offered that the extension of the sewer as commanded by the decree was feasible or possible, or that the cost of the same was within the ability of the appellants to pay. In other words, the decree was made without pleadings or evidence on that ground and without offering to the appellants any opportunity whatever to show that the extension was impossible and beyond the ability of the appellants to make.

For aught that court knew and for aught this court knows, the appellants have been required to run sewerage up-hill for in the neighborhood of two miles; that it might require miles of tunnelling to make the extension. In addition, it might cost an amount of money entirely beyond the ability of the city to pay, etc., etc. Certainly, there should have been some pleadings suggesting, and some evidence ~~providing~~ showing, its feasibility etc., etc., before the decree should have been made, and as there was none the action of the court in commanding it, was erroneous.

(2) The court below had no power to make such a decree. The extension of this sewer is purely a governmental

matter, and the appellants, in determining whether it should be made or not, would be exercising governmental functions and powers, and in these matters it cannot be directed by any court. To extend this sewer would require, 1st, the appointment of a civil engineer; 2nd, a survey of the routes; 3rd, an estimate of the cost; 4th, the advertisement for bidders; 5th, the issuing of bonds; 6th, the appointment of superintendents, etc., etc. These matters are all governmental in their nature and require the adoption of city ordinances, and the court below had no power to command the city to adopt such ordinances or to perform any act which is governmental in its character. In the exercise of their governmental functions the appelants are subject to no direction and no control by the courts. Cooley's Constitutional Limitations, 5 Ed., 255.

The Court below had no more power to require the city to extend this particular sewer than it had to require the city to sewer the town generally or to open streets or other highways for that purpose, and the decree was consequently beyond its power to make.

8. ON THE PLEADINGS.

The several assignments of error on this subject will be considered together. We think the Court below clearly erred in refusing to permit respondents to file their supplemental answer setting up the fact that the Vicksburg Water Works Company had sold all of its interest in the property and all of its rights under the contract of November 18th, 1886, and that it no longer had any interest in the subject matter of the litigation. It had been shown by the petition and the original bill in the nature of a supplemental bill, filed by the City Water Works & Light Company, that the Vicksburg Water Works Company had conveyed all of its interest to the City Water Works & Light Company, and the deed of conveyance had been filed as an exhibit to said bill; also that the City Water Works & Light Company was in

possession of the property and was operating the same, and was entitled to the hydrant rentals, etc., etc., but there was no evidence showing that there had been any conveyance by the City Water Works & Light Company back to the Vicksburg Water Works Company. It was clear, therefore, that the supplemental answer was not filed for delay, but that the city might protect its rights in the premises. We think that the Court erred in proceeding to judgment without requiring the City Water Works & Light Company to be made a party to the suit, as asked for by the appellant. The following authorities are, we think, conclusive on this point:

Equity Rule No. 57.
Bates Fed. Equity Precedure, Vol. 2, 642–647.
Hazel Tripod Boiler Co. vs. Citizens St. Ry. Co., 72 Fed. Rep., 327.
Ross vs. Ft. Wayne, 63 Fed. Rep. 466.

It will be remembered among other things the Court below decreed that the appellants should pay the hydrant rental due at the time the decree was rendered, to the appellee. The appellants had been informed in a manner about which there could be no doubt, that these hydrant rentals did not belong to the appellee, but belonged to the City Water Works & Light Company, and if the appellee, the Vicksburg Water Works Company could go on and recover these hydrant rentals, as was done in this case, what was there, or what is there now, to prevent the City Water Works & Light Company from suing for and recovering the same again? Certainly these hydrant rentals belonged to the City Water Works & Light Company only a few days before the final decree in this case, if the statements of the City Water Works & Light Company and the Vicksburg Water Works Company are to be believed; and there is absolutely no evidence that there was ever any change of ownership from the City Water Works & Light Company to the Vicksburg Water Works Company. In order to have protected the appellants against the payment of these hydrant rentals twice, if for no other

reason, the Court below ought to have permitted the filing of the amended and supplemental answer, and erred in not doing so.

We respectfully submit that the motion to affirm should be denied.

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M. DABNEY.
Solicitors for Appellant.